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In The

Supreme Court of the United States

STATE OF UTAH; UTAH DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah municipal Corporation,

Petitioners,

vs.

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & CO. dba KUNZ OUTDOOR ADVERTISING, a California Corporation; GALE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL McCALEB, in his capacity as Assistant Secretary of Interior, Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director, Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 5 of the Indian Reorganization Act, 42 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion," to acquire land "for Indians." Here, the Secretary accepted into trust for the Shivwits Band two parcels along an interstate that were purchased by the Band with a loan from a California company. In exchange, the Band granted the non-Indian company long-term leases allowing billboards that are otherwise prohibited by state and local laws. The question presented is:

> Whether Congress's standardless grant of complete discretion to an Executive branch officer to acquire land "for Indians" is an unconstitutional delegation of legislative power.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE CIRCUIT COURT'S APPLICATION OF THE NONDELEGATION DOCTRINE TO SECTION 5 OF THE IRA CONFLICTS WITH THIS COURT'S PRIOR DECISIONS	11
A. *Mistretta* and *Whitman* require Congress to legislate a policy and standards for its implementation, both absent here	11
B. *Whitman* precludes resort to legislative history, which, in any event, does not supply the requisite "intelligible principle" guiding the Secretary's discretion	15
II. THE EXECUTIVE BRANCH'S UNBRIDLED POWER TO ACQUIRE NONRESERVATION LAND "FOR INDIANS," IMMUNIZING IT FROM LOCAL REGULATION, IMPOSES SIGNIFICANT HARDSHIPS ON STATE AND LOCAL GOVERNMENTS NATIONWIDE	17
CONCLUSION	22

TABLE OF CONTENTS – Continued

Page

APPENDICES:

A: Opinion of the United States Court of Appeals for the Tenth Circuit (Nov. 9, 2005) 1

B: Opinion and Judgment of the United States District Court for the District of Utah (Oct. 22, 2003) 40

C: Opinion of the United States District Court for the District of Utah (Aug. 14, 2000) 57

D: 25 U.S.C. § 465 79

E: Sample Billboard Lease 81

F: Affidavit of Paul D. Held 88

G: Affidavit of Ken Esplin 92

H: Declaration of Wayne Nordwall 99

TABLE OF AUTHORITIES

Page

FEDERAL CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 14

Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946) .. 10, 13, 16

Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) . 7, 12, 15, 22

Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 19

Chase v. McMasters, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978) 19

City of Sherrill, N.Y. v. Oneida Nation of N.Y., 544 U.S. 197 (2005) 17

DeCouteau v. Dist. County Ct. for Tenth Jud. Dist., 420 U.S. 425 (1975) 18

Fallon Paiute-Shoshone Tribe v. City of Fallon, 174 F. Supp. 2d 1088 (D. Nev. 2002) 20

Fla. Dep't of Bus. Reg. v. United States Dep't of the Interior, 768 F.2d 1248 (1985), *cert. denied*, 475 U.S. 1011 (1986) 8

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 9, 15

Loving v. United States, 517 U.S. 748 (1996) 9

Mistretta v. United States, 488 U.S. 361 (1989) ..... *passim*

Morton v. Mancari, 417 U.S. 535 (1974) 4

Nat'l Broadcasting Co. v. United States, 319 U.S. 190 (1943) 14

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 18

TABLE OF AUTHORITIES – Continued

Page

Pan. Refining Co. v. Ryan, 293 U.S. 388 (1935) 14

Roberts v. United States, 120 S.Ct. 1960 (2000) 6, 17

South Dakota v. United States Dep't of the Interior, 423 F.3d 790 (8th Cir. 2005) 7, 22

South Dakota v. United States Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996) ..... *passim*

Touby v. United States, 500 U.S. 160 (1991) 8, 9

United States Dep't of the Interior v. South Dakota, 519 U.S. 919 (1996) 7, 8, 11, 21

United States v. Roberts, 185 F.3d 1125, (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000) ..... *passim*

Washington v. Confed. Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 19

Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) ..... *passim*

CONSTITUTIONAL PROVISIONS

U. S. Const. art. I, § 1 ..... 1, 9, 10

U. S. Const. art. I, § 8 2

FEDERAL STATUTES

18 U.S.C. § 1151 ..... 6, 18

18 U.S.C. § 1152 18

18 U.S.C. § 1153 5

18 U.S.C. § 1162 18

25 U.S.C. § 465 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1331 5
28 U.S.C. § 1360(a) 18
28 U.S.C. § 1362 5
28 U.S.C. § 2409a(a) 21

STATE LAWS AND MUNICIPAL ORDINANCES

St. George Code §§ 9-8-2(Q) 5
Utah Code Ann. §§ 72-7-503 to -507 (West 2004) 5

FEDERAL RULES

25 C.F.R. § 1.2 9
25 C.F.R. § 1.4 19
25 C.F.R. § 151.10(e) 20
25 C.F.R. § 151.11 20
25 C.F.R. § 151.12(b) 7, 20

OTHER MATERIALS

78 Cong. Rec. 11729-30 (June 15, 1934) 16
34 Fed. Reg. 637 (Jan. 16, 1969) 4
39 Fed. Reg. 32166-67 (Sept. 5, 1974) 4
60 Fed. Reg. 32874 (June 23, 1995) 8
61 Fed. Reg. 18082-83 (April 24, 1996) 7, 20
64 Fed. Reg. 17574-75 (April 12, 1999) 21

TABLE OF AUTHORITIES – Continued

Page

67 Fed. Reg. 46328 (July 12, 2002) 21

Antonin Scalia, Editorial, *How Democracy Swept the World*, Wall Street J., Sept. 7, 1999 8

Webster's Third New Int'l Dictionary 1754 (1993) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Utah, its Department of Transportation, and the City of St. George, Utah, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 428 F.3d 966 and reproduced here in the Appendix ("App.") at 1. The unreported opinion of the district court granting summary judgment to respondents is reproduced at App. 57. The unreported, interlocutory ruling on the constitutional question presented here is reproduced at App. 40.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 9, 2005. App. 2. On January 26, 2006, Justice Breyer extended the time to file a petition for a writ of certiorari to and including March 9, 2006. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, clause 3 of the Constitution gives Congress authority "[t]o regulate commerce . . . with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides, in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interest in lands, water rights, and surface rights, and for expenses incident to such acquisitions, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, that no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> * * *
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the

> United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The entirety of 25 U.S.C. § 465 is reproduced at App. 79.

STATEMENT OF THE CASE

This petition raises the thorny question of whether Congress has abdicated its constitutional duty to make laws by delegating to the Executive branch unrestricted power to take lands – any lands – into trust "for Indians." Because such acquisitions deprive state and local governments nationwide of authority to control the lands' use and development, to tax them, and to assert jurisdiction over them, the issue and the resulting intergovernmental frictions will not disappear until this Court provides a definitive resolution.

1. In mid-1993, Kunz and Company ("Kunz") made a shrewd proposal to the Shivwits Band of Paiute Indians. Kunz would provide the Band up-front money to buy land along Interstate 15 within the St. George, Utah, city limits, in an area where state and local laws prohibit billboards. The Band would then transfer the land to the United States to be held in trust for the Band and give Kunz an exclusive, long-term lease on the land, on which Kunz would erect advertising billboards. App. 5.

The impoverished Band, whose total revenues for 1999 were $90,417, accepted the deal. App. 51. The parties identified two empty parcels far from the Band's reservation, totaling about 2,000 feet of interstate frontage, and purchased them on August 9, 1994 with money from Kunz.

The next day, the Band submitted to the Bureau of Indian Affairs ("BIA") a special warranty deed to the land and an application for the United States to take the land into trust under Section 5 of the Indian Reorganization Act ("the IRA"), 25 U.S.C. § 465.[1] App. 5.

On August 31, 1995, the BIA approved the Band's request for approval of the trust acquisition and accepted the properties into trust. Kunz and the Band thereafter signed five separate, exclusive 20-year leases, approved by the BIA, allowing the erection and maintenance of five billboards. App. 5. Under one sample lease, the Band was to be paid $1,800 per billboard, per year, for the first fifteen years of the lease and $2,500 per year for the last five years; however, the up-front purchase money loaned to the Band constituted prepayment of the first 180 months (15 years) of rent due. App. 82. In contrast, Kunz would earn net income of at least $111,000 per billboard, per year, for a 20-year net income of at least $2.22 million. App. 90.

2. The State of Utah and the City of St. George became aware of Kunz's plan once construction of the billboards began. They tried to halt the work as violative of state and local restrictions on billboard permitting and placement.

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[1] As noted by the Tenth Circuit, in § 465 of the IRA Congress gave the Secretary of the Interior discretionary general authority to take lands into trust "for Indians." App. 9. The Secretary has redelegated exercise of this discretion to the Commissioner of Indian Affairs, who has redelegated it to the Bureau of Indian Affairs Area Directors. *See* 39 Fed. Reg. 32166-67 (Sept. 5, 1974); 34 Fed. Reg. 637 (Jan. 16, 1969). The BIA, however, is not disinterested in the trust land acquisition process since it is, uniquely, a "governing agency" expected to be responsive to the needs of the Indians and Indian tribes it governs. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

See Utah Code Ann. §§ 72-7-503 to -507 (West 2004); St. George Code §§ 9-8-2(Q), -4(B)(4). Kunz and the Band filed an action in federal district court under 28 U.S.C. §§ 1331, 1362, seeking a declaration that the land was lawfully held pursuant to Section 5 of the IRA and an injunction preventing the state and local governments from interfering with construction and operation of the billboards. They claimed that the trust lands were not subject to federal, state, or local laws or regulations concerning billboards. App. 62-63.

In their defense, the State and City counterclaimed against the Band and Kunz and cross-claimed against the impleaded federal officials. They sought, *inter alia*, a declaration that Section 5 is an unconstitutional delegation of legislative power because it contains no limits on the Secretary's discretion and no standards against which a reviewing court could test the exercise of the delegated authority. App. 9, 61, 63-64.

3. The district court summarily rejected this constitutional claim, citing *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000). App. 7, 64. The district court also eventually concluded that the trust land, as Indian country, was not subject to state or local billboard restrictions. App. 8, 45, 55.

4. On appeal, the Tenth Circuit affirmed the district court's ruling on the delegation issue based on its prior decision in *Roberts*. App. 10-13. Defendant Roberts had been convicted of violations of the Major Crimes Act, 18 U.S.C. § 1153, which confers on the United States "exclusive jurisdiction over certain offenses . . . committed in Indian Country. . . ." *Roberts*, 185 F.3d at 1129. The crimes occurred on nonreservation land in downtown Durant,

Oklahoma, containing an office complex, acreage that had been taken into trust by the Secretary for the Choctaw Nation. The tribe eventually used the offices as its administrative headquarters, bingo site, and rental space. *Id.*

Roberts challenged the federal district court's exercise of criminal jurisdiction over him for conduct at the office complex. The Tenth Circuit rejected this claim for two reasons. First, the trust land was "Indian country" under the Major Crimes Act, 18 U.S.C. § 1151. *Roberts*, 185 F.3d at 1129-35. Second, the court concluded § 465 of the IRA did not unconstitutionally delegate legislative authority to the Secretary. *Id.* at 1136-37.[2]

In the instant case, the Tenth Circuit reaffirmed this latter conclusion from *Roberts*, holding that "the statute itself provides standards" for the Secretary's exercise of discretion: the land must be acquired "for Indians" and none of the funds appropriated pursuant to § 465 could be used to provide land for Navajos outside their reservation boundaries. App. 11-12. Moreover, the court noted, the legislative history of the IRA identifies Congress's goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism" of the prior allotment policy. *Id.* (quoting *Roberts*, 185 F.3d at 1137).[3]

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[2] Defendant Roberts, then represented by the current Chief Justice, unsuccessfully petitioned for certiorari review on this issue. Petition for Writ of Certiorari at ii, *Roberts v. United States*, 120 S.Ct. 1960 (2000) (No. 99-1174).

[3] The court also held that the nonconstitutional claims were barred by sovereign immunity or were waived, App. 18, and that the State could not exercise its police powers to regulate billboard placement on these trust lands, which are Indian country. App. 33.

5. In rejecting the constitutional challenge to § 465, the *Roberts* court had uncritically adopted the reasoning of the dissent in *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"), *vacated and remanded*, 519 U.S. 919 (1996). Recently, two other circuits have done the same, including a new panel of the Eighth Circuit in the latest round of litigation after *South Dakota I*. *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790, 796 (8th Cir. 2005) ("*South Dakota II*"), *reh'g and reh'g en banc denied* (Feb. 6, 2006); *Carcieri v. Norton*, 423 F.3d 45, 57 (1st Cir. 2005), *petition for reh'g pending*.

In *South Dakota I*, the Eighth Circuit had held § 465 unconstitutionally delegated legislative authority to the Executive branch. 69 F.3d at 885. The court – dramatically, though not inaccurately – described the provision as a standardless delegation with so few "boundaries" or "intelligible principles" that "it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* at 882.

The Secretary petitioned for certiorari review in June 1996 on the question of the constitutionality of § 465. Faced with the Eighth Circuit's adverse ruling, the Secretary adopted a rule that – for the first time – permitted pre-acquisition judicial review of the Secretary's exercise of discretion under § 465.[4] *See United States Dep't of the Interior v. South Dakota*, 519 U.S. 919, 920-21 (1996) (Scalia, J., dissenting). Previously, the Secretary's unwavering position was just the opposite: no judicial review was

[4] The rule was adopted in 1996 (after the trust acquisition in the instant case) and codified at 25 C.F.R. § 151.12(b). *See* 61 Fed. Reg. 18082-83 (April 24, 1996).

available because § 465 gave the Secretary complete discretion. United States' Petition for Writ of Certiorari at 6-7, *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956) (hereafter "U.S. Petition").[5] Citing the new rule, the Secretary asked the Court to grant the petition, vacate the decision below, and remand to the Secretary for reconsideration of the decision to take the subject lands into trust. *Id.* at 15, 24. This Court granted the Secretary's unusual request. 519 U.S. at 919. Justices Scalia, O'Connor, and Thomas dissented. They would have granted the writ to address the constitutional issue. *Id.* at 923 (Scalia, J., dissenting).

REASONS FOR GRANTING THE WRIT

> [T]he most significant development in the law over the past thousand years . . . is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people.[6]

This principle is embodied in Article I, Section 1 of our Constitution: "All legislative power shall be vested in a Congress of the United States." From this language, the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160, 165 (1991). The doctrine "has developed to prevent

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[5] *E.g.*, *Fla. Dep't of Bus. Reg. v. United States Dep't of the Interior*, 768 F.2d 1248, 1256-57 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); 60 Fed. Reg. 32874 (June 23, 1995).

[6] Antonin Scalia, Editorial, *How Democracy Swept the World*, Wall Street J., Sept. 7, 1999, at A24.

Congress from forsaking its duties [to make laws]," *Loving v. United States*, 517 U.S. 748, 758 (1996), but it is also rooted "in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

Although Article I, Section 1 speaks in absolutes, this Court has long recognized that the nondelegation doctrine does not bar Congress from using other branches of government to execute and apply its enactments. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). But, for a delegation of decision-making authority to be constitutionally acceptable, "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (quoting *Hampton*, 276 U.S. at 409).[7]

Aware of the practical impossibility of Congress spelling out in statute every detail of its policies guiding our increasingly complex society, the Court has upheld delegations of power to another branch under broad, general directives. *Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 372. Nonetheless, a delegation is only "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, 488

[7] As the Tenth Circuit recognized here, App. 11-13, *Whitman* clarified that agency regulations that purport to constrain the otherwise unfettered discretion Congress grants an agency cannot save the statute from a constitutional challenge based on Article I, Section 1. 531 U.S. at 472-73. In any event, agency regulations concerning trust land acquisitions can always be waived by the Secretary "in the best interest of the Indians." 25 C.F.R. § 1.2.

U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Significantly, the degree of discretion granted that is acceptable under the nondelegation doctrine "varies according to the power congressionally conferred." *Whitman*, 531 U.S. at 475 (noting Congress must provide "substantial guidance" on setting air standards that affect the national economy).

Petitioners are well aware that the Court has rarely struck down a federal statute as violating Article 1, Section 1. *See Whitman*, 531 U.S. at 474. But if any statute fails under the nondelegation doctrine, it is Section 5 of the IRA.

As the Secretary told this Court a decade ago, Section 5 is a "central component of the IRA," the cornerstone of modern federal law respecting Indians. U.S. Petition at 16 n.6, 17. Yet Section 5 simply grants the Secretary authority to take land into trust "for Indians." It imposes no other relevant, substantive limits on the exercise of this power. Thus, local BIA officials (as the Secretary's subdelegees) are left with carte blanche authority to acquire lands of any size, of any character, for any purpose, in any location. No other federal officer wields such unilateral power.

The instant case typifies the abuse made possible by such an open-ended grant of legislative authority to the Executive branch. Unconstrained by Congress, the Secretary has acquired nonreservation land within the City of St. George and allowed a non-Indian lessee to install billboards, illegal under State and local restrictions, with impunity. The City can no longer tax the land or, absent the Secretary's permission, protect the public health and safety by enforcing land use restrictions that do apply to properties abutting the trust lands. Sadly, the primary

economic benefit from these trust lands does not even inure to the Band but to a non-Indian business that has bought itself – at bargain prices – a valuable exemption from local governmental regulation.

This case cries out for enforcement of the nondelegation doctrine as a curb on congressional abdication of its duty to make laws, as well as a tool for ensuring appropriate separation of powers between the legislative and executive branches of government. The Tenth Circuit's application of the nondelegation doctrine to Section 5 conflicts with this Court's precedents and ignores the serious impingements on state sovereignty and local authority that trust land acquisitions cause. Although the Court has twice declined to do so,[8] it should seize this opportunity to answer the important and recurring question of whether Section 5 of the IRA violates Article I, Section 1 of the Constitution by giving absolute discretion to the "ruler" and his "ministers" to determine whether, when, how, where, and why to acquire land in trust "for Indians."

I. THE CIRCUIT COURT'S APPLICATION OF THE NONDELEGATION DOCTRINE TO SECTION 5 OF THE IRA CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

A. *Mistretta* and *Whitman* require Congress to legislate a policy and standards for its implementation, both absent here.

The Tenth Circuit upheld Section 5, reasoning that "the statute itself" provides standards for the Secretary's

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[8] *Roberts v. United States*, 120 S.Ct. 1960 (2000); *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996).

exercise of discretion because trust lands must be acquired "for Indians" and appropriated funds cannot purchase off-reservation land for the Navajos. App. 11-12. This conclusion, which the First and Eighth Circuits also recently adopted,[9] is inconsistent with the nondelegation doctrine crafted by the Court, which requires Congress to legislate a general policy and the boundaries of the agency's delegated authority. *Mistretta*, 488 U.S. at 372. In Section 5, Congress has provided neither.

First, although Section 5 prohibits the Secretary from using funds appropriated under it to expand the Navajo reservation, this is no restriction on the Secretary regarding non-Navajos, such as the Band. In any case, this funding provision has no relevance where, as here, the trust lands were purchased by the Indians, not by the Secretary.

Second, the directive to the Secretary to acquire lands in trust "for Indians" is, at best, a declaration of the ultimate congressional goal at which Section 5 aims. Although it surely precludes the Secretary from acquiring trust lands "for Italian-Americans," it does not state a "policy," in the usual sense, i.e., "a definite course or method of action selected . . . from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." *Webster's Third New Int'l Dictionary* 1754 (1993).

Even if the phrase "for Indians" were charitably viewed as stating a general policy of increasing the quantity of lands held by the United States "for Indians,"

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[9] *Carcieri*, 423 F.3d at 57-58; *South Dakota II*, 423 F.3d at 797.

neither Section 5 nor the rest of the IRA supplies "an intelligible principle to which [the Secretary] is directed to conform" in doing so, required by *Whitman*. 431 U.S. at 472. Congress has set no boundaries on the Secretary's exercise of discretion to acquire lands "for Indians"; thus, the Secretary is free to fill in the blanks and acquire any land, anywhere, for any purpose as long as it is for an Indian tribe or individual Indian. The acquisition could be of one city lot in a subdivision, ten acres along Main Street in downtown Salt Lake City, or the entire State of Iowa. If § 465 can be used, as here, to circumvent local billboard laws, it can be used to circumvent other local restrictions, such as those limiting siting of sexually explicit businesses. As the Eighth Circuit aptly summarized it in *South Dakota I*, "[t]he result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles." 69 F.3d at 885.

Importantly, Section 5 of the IRA is very different from other statutes upheld by the Court as constitutional delegations of legislative power. *Mistretta*, for example, upheld a delegation to "an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines" consistent with the "significant statutory direction" provided by Congress. 488 U.S. at 412. In contrast, acquiring land for Indians is not a subject that requires the expertise of an elite corps of civil servants to provide detailed standards. In addition, there are no statutory terms in Section 5 that can be narrowly construed to avoid unconstitutionality, *see id.* at 373 n.7, or that have established meanings in another context that can be imported into Section 5, *see, e.g., Am. Power & Light*

Co., 329 U.S. at 104 ("Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities."). Nor would greater specificity by Congress be insignificant or impossible, as in *Whitman*. 531 U.S. at 473-74 (upholding a delegation to EPA to set ambient air quality standards, "allowing an adequate margin of safety," that are "requisite to protect public health"); *see also Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) ("[P]ublic interest, convenience, or necessity" standard is "'as concrete as the complicated factors for judgment in such a field of delegated authority permit.'").

Instead, Section 5 is like the statutes held to violate the nondelegation doctrine in *Pan. Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In *Panama Refining Co.*, the offending statute empowered the Executive to prohibit transport of petroleum produced or withdrawn from storage in excess of the amounts permitted by state laws. 293 U.S. at 415. In *Schechter Poultry*, the Live Poultry Code authorized the Executive to approve a code of fair competition for an industry in order to rehabilitate it. 295 U.S. at 541-42. Both statutes, enacted by the same Congress as the 1934 IRA, were struck down because, as this Court recently put it, "Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 374 n.7; *see Pan. Refining Co.*, 293 U. S. at 430; *Schechter Poultry*, 295 U.S. at 541-42. Section 5 suffers from the same glaring deficiencies.

B. *Whitman* precludes resort to legislative history, which, in any event, does not supply the requisite "intelligible principle" guiding the Secretary's discretion.

To fortify its conclusion that the statute itself provides limiting standards against which the Secretary's Section 5 acquisitions can be assessed, the Tenth Circuit noted that the legislative history of the IRA identified Congress's goals: rehabilitating the Indian's economic life and developing Indian initiative. App. 11-12 (quoting *South Dakota I*, 69 F.3d at 887-88 (Murphy, J., dissenting) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934))). Other circuits have used the same cases and language to support their decisions upholding Section 5. *Carcieri*, 423 F.3d at 57-58; *South Dakota II*, 423 F.3d at 797-98.

This Court made it clear in *Whitman*, however, that it is inappropriate to look to legislative history to provide the intelligible principle guiding and limiting an agency's exercise of delegated power. "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *Hampton*, 276 U.S. at 409). Congressional reports and statements from the floor of the House or Senate do not constitute a "legislative act."

Even if the cited legislative history of the 1934 IRA were an appropriate source for nondelegation doctrine analysis, it still provides no standards to guide the Secretary's exercise of discretion in acquiring land "for Indians." It simply restates the purpose of Congress in enacting the

IRA.[10] Thus, it would be fair to say that Section 5 broadly empowers the Secretary to acquire trust lands "for Indians" in order to achieve the congressional purpose of acquiring land for Indians. But this tautology imposes no meaningful constraints on the Secretary, as every acquisition under Section 5 is "for Indians," regardless of who else is benefitted or harmed by it.

To be sure, if Congress had enacted standards in Section 5 or elsewhere, they could be fleshed out by reference "to the purpose of the [IRA], its factual background, and the statutory context in which they appear." *Am. Power & Light Co.*, 329 U.S. at 104. In *Mistretta*, for example, the Court looked to legislative history to add content to the numerous factors, *provided in the statute itself*, that were to guide the Sentencing Commission's adoption of sentencing guidelines. 488 U.S. at 376 n.10. Here, however, there are no statutory standards to be fleshed out. There is only Congress's wholesale abdication of its law-making authority to the Secretary, who is simply authorized to take lands into trust "for Indians."

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[10] Ironically, the legislative history specifically addressing Section 5 – which the Tenth, Eighth, and First Circuit panels have chosen to ignore – shows that Congress's original intent was to acquire rural lands in trust for landless Indians, to be used by them for agrarian purposes (farming, grazing, and logging). *See* H.R. Rep. No. 1804, 73rd Cong., 2d Sess., 6-7; 78 Cong. Rec. 11729-30 (June 15, 1934) (discussed in *South Dakota I*, 69 F.3d at 883-85). But these narrow purposes were not incorporated into the statute as enacted.

II. THE EXECUTIVE BRANCH'S UNBRIDLED POWER TO ACQUIRE NONRESERVATION LAND "FOR INDIANS," IMMUNIZING IT FROM LOCAL REGULATION, IMPOSES SIGNIFICANT HARDSHIPS ON STATE AND LOCAL GOVERNMENTS NATIONWIDE.

It is hard to overstate the adverse impacts of the Secretary's exercise of her broad, uncabined discretion under Section 5. Every time the Secretary's BIA subordinates take land into trust pursuant to Section 5, a state loses the sovereign power to enforce its laws consistently within its own boundaries.

As this case exemplifies, the Secretary's unfettered ability to acquire trust lands anywhere creates scattered trust land "islands" where tribal or federal law, not state or local law, applies. The Court has already recognized the practical problems that result from such fragmentation: "A checkerboard of alternating state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197, ___ (2005) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

Trust lands determined to be Indian country, like those here, are removed from state criminal jurisdiction for some serious crimes committed there by or against Indians. *E.g.*, *Roberts*, 185 F.3d at 1133 (federal court has jurisdiction over Indian defendant where serious crime covered by Major Crimes Act was committed on trust

lands held to be Indian country).[11] For other crimes in Indian country, either the federal government, the tribe, or both have criminal jurisdiction. *See* 18 U.S.C. §§ 1152, 1153.

A property's status as Indian country is also the touchstone for determining if a state can assert civil jurisdiction over Indians. *See DeCouteau v. Dist. County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975) (§ 1151 expressly addresses criminal jurisdiction, but generally applies as well to questions of civil jurisdiction).[12] And local governments' ability to regulate civilly the activities of non-Indians in Indian country is determined using a discrete pre-emption analysis that balances competing tribal and governmental interests. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

Even if trust lands are not, as here, held to be Indian country, placement of land into trust puts it largely beyond the control or oversight of local authorities. The Secretary has already sweepingly legislated that trust lands are not subject to "the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights," 25 C.F.R.

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[11] This is not so as to Indian country over which a state has taken jurisdiction pursuant to Public Law 280, 18 U.S.C. § 1162.

[12] *But see* 28 U.S.C. § 1360(a) (enumerating several states that have been granted jurisdiction over civil causes of action to which Indians are parties, notwithstanding that they arose in identified areas of Indian country and providing that general civil state laws apply there). Even this grant does not permit encumbrance, state taxation of trust lands, or local regulation that conflicts with federal law. *See id.* § 1360(b).

§ 1.4.(a), unless the Secretary decides they should be, *see id.* § 1.4.(b). Local communities are thus stripped of the ability to enforce needed land use and development restrictions uniformly on trust lands within their borders, to the detriment of the health, safety, and welfare of all citizens, Indian and non-Indian, and to the benefit of trust land lessees like Kunz.

In this way, the Secretary allows Indians to market to non-Indians their exemption from state and local government regulation. This practice has already been prohibited by the Court in the context of state taxes of on-reservation cigarette purchases by non-Indians: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Washington v. Confed. Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

There are also financial ramifications for local governments, as Section 5 itself renders trust lands tax-exempt. 25 U.S.C. § 465 ("lands or rights shall be exempt from State and local taxation"); *see also Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (Section 5 sets forth "procedure by which lands held by Indian tribes may become tax exempt"). States and local communities may thus lose significant revenues when lands are taken into trust.[13]

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[13] Despite their loss of authority over, and revenue from, trust lands, state and local governments may still be held responsible for providing services to these tax-exempt properties. *See, e.g., Chase v. McMasters*, 573 F.2d 1011, 1019 (8th Cir.) (Indian plaintiff stated § 1983 damage claim for violation of § 465 against municipal officials who

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It is no consolation that the Secretary, after the acquisition here, adopted rules requiring the BIA to notify state and local governments of a proposed trust land acquisition, 25 C.F.R. § 151.11,[14] to postpone the actual taking of title to the property until the end of a 30-day comment period, *id.* § 151.12(b), and to no longer oppose judicial review of its final acquisition action under the Administrative Procedures Act during that limited period, *see* 61 Fed. Reg. 18082 (April 24, 1996) (summary).

Even if Petitioners had been given prior notice and the opportunity for judicial review under the APA, nothing prevents the Secretary from taking title at the close of the comment period, notwithstanding timely opposition from local governments based on the proposed acquisition's violation of local or federal laws or even on the BIA's failure to follow its own acquisition process rules. And once the United States takes title in trust, as the Tenth Circuit has held and the Secretary has consistently maintained, the remedies of divestiture of the United States or invalidation of the conveyance of title to it become unavailable under the APA because of the exemption of trust lands

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refused to connect city water and sewer lines to her land, held in trust by United States), *cert. denied*, 439 U.S. 965 (1978); *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp. 2d 1088, 1091-93 (D. Nev. 2002) (tribe alleging city refused to provide services to trust land stated § 1983 claim).

[14] At the time of the acquisition here, notice to the state and local governments was not expressly required by the Secretary's regulations. App. 19. The BIA sent the City a letter about the Band's intent to purchase the properties, with no mention of the planned advertising purpose. The State, however, was not notified, *see* App. 4, even though 25 C.F.R. § 151.10(e) then required the Secretary to consider the impact that removing the lands from the tax rolls would have on the State and its political subdivisions.

from the waiver of the federal government's immunity in the Quiet Title Act, 28 U.S.C. § 2409a(a). App. 15; *see United States Dep't of the Interior*, 519 U.S. at 921 (Scalia, J., dissenting).

The Tenth Circuit's scant nondelegation analysis of Section 5 ignores the nationwide scope and impact of the power this provision confers on local BIA bureaucrats. *See Mistretta*, 531 U.S. at 475. The unbounded authority of the Executive branch to stockpile lands "for Indians" under Section 5 and insulate them from state and local control is important across the country, not just to a few states in the West. At the end of 1997, more than 56 million acres in 36 states were already held in trust by the Secretary. *See* U.S. Dep't of the Interior, "Lands under the Jurisdiction of the Bureau of Indian Affairs as of December 31, 1997." In 1999, the Department of the Interior estimated that it receives 7,000 trust and acquisition applications annually. 64 Fed. Reg. 17574-75 (April 12, 1999).

There are no signs that the glut of applications is subsiding. On the contrary, it will likely grow as non-Indian enterprises like Kunz recognize how easily Section 5 can be exploited to avoid legitimate state laws and land use or development restrictions. There is no shortage of opportunities: three years ago, there were 560 federally-recognized Indian tribes in the United States and hundreds more tribal recognition petitions pending at the BIA. 67 Fed. Reg. 46328 (July 12, 2002). Likewise, as long as the Secretary wields unconstrained and unreviewable power to alter local tax bases and jurisdictional boundaries by taking lands into trust "for Indians," there is no reason to expect that tensions between state and local governments on the one hand and tribes and the BIA on the other – evidenced by decades

of litigation in this case, *Carcieri*, and *South Dakota I* and *II* – will do anything but increase.

Trust land acquisitions under Section 5 can disturb the balance of power between the State and the federal governments, as well as that between the State and local governments and the tribes within their borders, creating chaotic jurisdictional checkerboards. Moreover, unconstrained by any meaningful congressional limits on the Secretary's authority under § 465, the Tenth Circuit has given Indians the green light to market their exemption from state and local regulation. If such circumvention of the laws is permitted by § 465, then certainly there are no "boundaries of this delegated authority," required by the "intelligible principle" standard, sufficient to satisfy Article I, Section I of the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2006

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING,

Plaintiffs-Counterclaim Defendants-Appellees,

v.

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah Municipal corporation,

Defendants-Counterclaim Plaintiffs-Appellants,

GAYLE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL A. McCALEB, in his capacity as Assistant Secretary of the Interior Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Third-Party Defendants-Appellees.

No. 03-4274

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:95-CV-1025-TC)

(Filed November 9, 2005)

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Ellen J. Durkee, Attorney, Environment & Natural Resources Division, United States Department of Justice, Washington, DC (Todd S. Aagaard, Attorney, United States Department of Justice, Washington, DC, Thomas L. Sansonetti, Assistant Attorney General, Washington, DC, Paul M. Warner, United States Attorney, Salt Lake City, UT, John K. Mangum, Assistant United States Attorney, Salt Lake City, UT, Thomas A. Blaser, of counsel, Office of the Solicitor, United States Department of the Interior, Washington, DC, and William R. McConkie, Office of the Regional Solicitor, United States Department of the Interior, Salt Lake City, UT, with her on the briefs), for the Federal Appellees.

Before **BRISCOE, KELLY,** and **LUCERO,** Circuit Judges.

BRISCOE, Circuit Judge.

The State of Utah, the Utah State Department of Transportation, and the City of St. George, Utah (collectively the defendants), appeal from the district court's grant of summary judgment in favor of plaintiffs Kunz and Company and the Shivwits Band of Paiute Indians holding that defendants lacked authority to regulate billboard advertising displays erected by Kunz on land held in trust by the federal government for the Band. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

Factual background

In July 1993, Kunz and Company, d/b/a Kunz Outdoor Advertising (Kunz), a California corporation, approached the Shivwits Band of Paiute Indians (the Band) and proposed that the Band purchase, with money provided by Kunz, land south of St. George, Utah (the City) along the Interstate 15 corridor, transfer that land to the federal government to be held in trust for the Band, and lease the land to Kunz on a long-term basis so that Kunz could erect and maintain advertising billboards thereon. The Band, eager to pursue economic development opportunities that would increase its meager revenue stream, accepted Kunz's proposal in October 1993. In November 1993, Kunz and the Band identified two parcels of land adjacent to

Interstate Highway 15 in an undeveloped area within the City limits.[1] After several months of negotiations, the private owners of the parcels agreed in May 1994 to sell them to the Band.

The Bureau of Indian Affairs (BIA), aware of the relationship between Kunz and the Band, contacted the City's manager on July 7, 1994, orally advised him that the Band intended to purchase the two parcels of land, and asked if the City "would provide a letter of support for this endeavor" to the Band. App. at 128A. The City's manager allegedly refused to provide such a letter because the City was "afraid the land would be used for the purpose of erecting outdoor advertising signs and the City was opposed to [such] signs." *Id.* On August 1, 1994, the BIA sent a letter to the City again stating that the Band was "in the process of purchasing two small parcels of land located in an undeveloped area of" the City. Fed. Aplee. Supp. App., at 1. The letter proceeded to identify the two parcels in detail by location and tax identification numbers. The letter concluded by again asking the City to support the Band's endeavor. According to the record, the City did not respond to the BIA's letter.[2] App. at 131.

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[1] The first parcel "consists of 14.25 acres with more than 1,147 feet of . . . frontage" on Interstate 15. App. at 174. The second parcel "consists of 11.07 acres" and "has approximately 771 feet of I-15 frontage. . . ." *Id.* Both parcels are located south of the Bloomington Exit on the east side of I-15 in the City. *Id.*

[2] At that time, applicable federal regulations did not require the BIA to notify either the state or local government of a proposed trust acquisition. App. at 150. The applicable federal regulations were subsequently modified, and now require the BIA to notify "the state and local governments having regulatory jurisdiction over the land to be acquired," and provide those governments with a thirty-day time period

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On August 9, 1994, the Band purchased the parcels from the private owners. One day later, on August 10, 1994, the Band tendered a special warranty deed to the BIA that purported to transfer the parcels into trust. Because an off-reservation trust acquisition must be formally approved by the BIA, the Band also submitted an application and supporting documents to the BIA requesting such approval. *Id.* at 36, 128A, 131.

In reviewing the Band's application, the BIA concluded, consistent with its then-existing policies, that no environmental assessment (EA) was required for the act of taking the parcels into trust. App. at 36, 131. More specifically, the BIA classified as "categorically excluded" (i.e., not requiring an EA) any proposed trust acquisition in which there would be "no immediate change in the use of the land." *Id.* at 131. The BIA did, however, require an EA to be prepared regarding the proposed leasing of the parcels to Kunz and the related use of the land for outdoor advertising displays. That EA was completed on July 6, 1995. A "Finding of No Significant Impact" (FONSI) was subsequently issued by the BIA on August 31, 1995.

On the same date the FONSI was issued, i.e., August 31, 1995, the BIA approved the Band's request for approval of the trust acquisition and formally accepted the properties into trust. Thereafter, Kunz and the Band finalized, and the BIA approved, five separate leases covering the two parcels and permitting Kunz to erect and maintain a total of five advertising billboards thereon.

"in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction. . . ." 25 C.F.R. § 151.11(d) (2004).

On October 25, 1995, shortly after Kunz began construction of the billboards, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened criminal suit against Kunz if the construction did not immediately cease. Kunz ignored the warning and continued construction. On November 3, 1995, the City issued a stop work order, forbidding Kunz from further construction of the signs on the grounds that it violated state and local outdoor advertising regulations, and Kunz had no city or state sign permits.

Procedural background

On November 17, 1995, Kunz and the Band filed this action against defendants seeking a declaratory judgment and preliminary and permanent injunctive relief. More specifically, Kunz and the Band sought an order declaring that the property at issue was lawfully held by the Band, and injunctive relief restraining defendants from interfering with the construction and operation of the billboards. Defendants filed an answer and counterclaim against plaintiffs and a third-party claim against the United States. *Id.* The counterclaim and third-party claim alleged "that (1) the statute authorizing land acquisitions, 25 U.S.C. § 465 (and the accompanying regulation, 25 C.F.R. § 1.4)[wa]s unconstitutional; (2) the taking of the land in trust and the approval of the lease . . . violated the National Environmental Policy Act ("NEPA") and . . . [Department of the Interior (DOI)] . . . regulations; and (3) the erection of billboards on the property violate[d] certain state and local regulations." App. at 38.

The parties subsequently filed their first round of summary judgment motions.[3] On August 11, 2000, the district court issued an order ruling on those motions. In pertinent part, the district court concluded that: (1) 25 U.S.C. § 465 was not an unconstitutional delegation of legislative power; (2) the BIA acted arbitrarily and capriciously in determining that the acquisition of the land was subject to a categorical exclusion and that it was therefore unnecessary to conduct an EA prior to the acquisition; (3) the failure to comply with the procedural requirements of NEPA and conduct a pre-acquisition EA was "more than de minimus," App. at 15; and (4) "[t]he failure to prepare any NEPA review of the land acquisition was a procedural harm that frustrated NEPA's goals. . . ." *Id.* at 52. Accordingly, the district court ordered "that the required NEPA process be undertaken." *Id.* at 53. The district court's order stated, however, that the order "did not affect the fact that the government held the land in trust by special warranty deed. . . ." *Id.* at 60. Instead, it purported to "invalidate the agency's decision to take the land in trust until the BIA complied with the procedural requirements of NEPA." *Id.*

Defendants subsequently moved for summary judgment on the issue of whether they had authority to regulate the land at issue. In pertinent part, defendants argued that the two parcels of land were neither held in trust for the Band nor constituted "Indian Country." The district court denied defendants' motion on February 6,

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[3] On February 7, 1996, the district court issued a preliminary injunction prohibiting defendants from imposing any stop work order or otherwise interfering with the construction or use of the billboards. Protected by this injunction, Kunz completed construction of the five billboards and leased the billboard space to various advertisers.

2002. In doing so, the district court concluded that "the Indian Lands exemption in [the] Quiet Title Act, 28 U.S.C. § 2409a(a) . . . , applie[d]," and thus "the government [wa]s immune from questions to the title" to the land. *Id.* at 61. The district court further concluded that, because the BIA "ha[d] not completed the NEPA process as was mandated [in] the [court's] August 11, 2000 order," there was "no final agency decision which settle[d] the status of the land at issue." *Id.*

On March 17, 2003, the district court conducted a status conference, at which time the BIA indicated it had completed the court-ordered EA and "ha[d] approved a Finding of No Significant Impact (FONSI) for the Shivwits Band fee-to-trust land transfer and outdoor advertising leases. . . ." *Id.* at 169. The BIA further indicated that it would not "seek . . . to remove the land from trust status . . . or . . . remove approval of the five billboard leases." *Id.*

At the direction of the court, the parties subsequently filed cross motions for summary judgment concerning the remaining issues in the case. On October 22, 2003, the district court issued an order granting summary judgment in favor of the plaintiffs. In that order, the district court concluded that defendants lacked "the authority to impose restrictions on the placement of billboards on" the land at issue. *Id.* at 74. More specifically, the district court concluded that because the land at issue was held in trust by the BIA for the Band, it constituted "Indian Country" under 18 U.S.C. § 1151 and thus was exempt from state and local regulation. *Id.* at 77. The district court also concluded "that even if the [Highway Beautification Act of 1966, 23 U.S.C. § 131,] applie[d] to the trust land at issue . . . , the Act [wa]s subject to federal (not state) enforcement, and [thus] d[id] not expressly authorize the regulation intended by Utah

and St. George." *Id.* at 79. On that same date (October 22, 2003), the district court entered a judgment in favor of plaintiffs stating the defendants "ha[d] no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the" Band. *Id.* at 90.

II.

Defendants assert a number of arguments on appeal. Broadly speaking, defendants contend that the statute authorizing acquisition of the land is unconstitutional, that the acquisition of the land and approval of the lease agreements violated applicable environmental laws and procedural regulations, and that they possess the authority to regulate the property and billboards at issue. As outlined in greater detail below, we find no merit to any of these arguments.

Does § 465 of the Indian Reorganization Act violate the non-delegation doctrine?

The trust acquisition of the properties at issue was completed pursuant to § 465 of the Indian Reorganization Act (IRA). Section 465 provides, in pertinent part, as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided,
>
> That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
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> * * *
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired. . . .

25 U.S.C. § 465.

In the course of the district court proceedings, defendants challenged the trust acquisition on the grounds that § 465 was "an unconstitutional delegation of legislative power because it contain[ed] no limits on the Secretary's discretion and no standards against which a reviewing court c[ould] test the exercise of delegated power." Aplt. Br. at 8. The district court rejected that argument, noting that this court had rejected a similar argument in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999). Defendants now challenge the district's ruling on appeal. We apply a de novo standard of review. *See United States v.*

Weed, 389 F.3d 1060, 1067 n.6 (10th Cir. 2004) ("We review challenges to the constitutionality of a statute de novo.") (internal quotations omitted).

Where, as here, a party has challenged a federal statute on the grounds that it violates the "nondelegation doctrine," "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 472 (2001). "Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.'" *Id.* "This text permits no delegation of those powers . . . and so [the Supreme Court] repeatedly ha[s] said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

In *Roberts*, a criminal case, the defendant was charged with and convicted of violations of the Major Crimes Act, 18 U.S.C. § 1153, which "confers on the United States exclusive jurisdiction over certain offenses . . . committed in Indian Country. . . ." 185 F.3d at 1129. On appeal, the defendant challenged the district court's exercise of jurisdiction, arguing, in part, that § 465 of the IRA "unconstitutionally delegate[d] standardless authority to the Secretary" of the DOI. *Id.* at 1136. This court rejected the defendant's challenge to the constitutionality of § 465. In doing so, this court stated:

> [W]e have previously acknowledged the statute [§ 465] itself places limits on the Secretary's discretion. (citation omitted). * * * For example, the statute provides any land must be acquired for

> Indians as defined in 25 U.S.C. § 479 and funds appropriated for the acquisitions may not be used to provide land for Navajos outside their reservation boundaries. (citation omitted). And, the legislative history identifies goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism" of the prior allotment policy and indicates the Secretary must assure continued "beneficial use by the Indian occupant and his heirs." (citation omitted).

Id. at 1137. The *Robert's* court also rejected the defendant's alternative argument that, "even if the trust process c[ould] . . . survive a delegation challenge, it [wa]s only by virtue of the [BIA] regulations enacted in 1980, and subsequently amended, which place[d] additional limits on the Secretary's discretion and facilitate[d] judicial review." *Id.* at 1136 n.8. More specifically, the *Robert's* court stated: "we disagree based on our belief the statute itself provides standards for the Secretary's exercise of discretion." *Id.*

The decision in *Roberts* is clearly binding on the panel in this case, "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). Obviously recognizing that rule, defendants assert that *Whitman* constitutes just such a superseding contrary decision by the Supreme Court. According to defendants, *Whitman* "modernized the non-delegation doctrine," Aplt. Br. at 8., by (a) clarifying that an agency cannot "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power," *id.* at 9-10 (quoting *Whitman*, 531 U.S. at 473), and (b) establishing that the necessary "intelligible principle" that must be laid down by Congress "must be found within the 'four corners

of the statutory language' itself, rather than being inferred from the legislative history." *Id.* at 11 (quoting *Whitman*, 531 U.S. at 473).

We reject defendants' arguments. To begin with, only the first of the two principles cited by defendants is discussed in *Whitman* (i.e., that an agency cannot cure a non-delegation problem by declining to exercise some of the power). The second alleged principle, i.e., that the "intelligible principle" must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*. Rather, that "principle" comes from the Eighth Circuit's now-vacated decision in *South Dakota v. United States Department of the Interior*, 69 F.3d 878, 882 (8th Cir. 1995), *vacated by* 519 U.S. 919 (1996).[4] Moreover, a reading of the entire *Whitman* decision indicates that the Court did not rewrite or "modernize" the non-delegation doctrine. To the contrary, the Court reviewed in detail and applied its past precedent concerning the non-delegation doctrine. Importantly, for purposes of this appeal, that precedent was in existence at the time this court issued its decision in *Roberts*. Moreover, it is worth noting that the Court in *Whitman* emphasized that it "ha[d] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment

[4] A review of defendants' appellate brief suggests that they are relying not so much on *Whitman*, but rather on *South Dakota*, in which a panel of the Eighth Circuit, in a 2-1 decision, concluded that § 465 violated the non-delegation doctrine. Notably, however, the Supreme Court ultimately vacated that decision, with a majority of the Court choosing not to publish an opinion explaining their reasoning for doing so. Thus, the Eighth Circuit's decision has no precedential value. Moreover, the panel in *Roberts* made note of *South Dakota*, but ultimately chose to adopt the position of the dissenting judge in that case.

that can be left to those executing or applying the law.'" 531 U.S. at 474-75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). Indeed, the Court noted that only on two occasions in its history (the last time in 1935) had it "found the requisite 'intelligible principle' lacking" in a challenged statute. *Id.* at 474.

Since the issuance of *Whitman*, the First Circuit has agreed with *Roberts* that § 465 does not amount to an unconstitutional delegation of legislative power. In reaching that conclusion, the First Circuit cited *Whitman*, but made no mention of it having altered or "modernized" the non-delegation principles that were in place when *Roberts* was decided. *See Carcieri v. Norton*, 398 F.3d 22, 32-34 (1st Cir. 2005).

In sum, we conclude *Whitman* does not constitute a "superseding contrary" decision that would allow us to ignore the holding in *Roberts*. Thus, consistent with *Roberts*, we reject defendants' assertion that § 465 of the IRA violates the non-delegation doctrine.

Indian Lands Exception to Quiet Title Act

Defendants contend the district court erred in concluding that the Indian lands exception to the Quiet Title Act (QTA) precluded it from reviewing and remedying any alleged shortcomings in the process of taking the land at issue into trust (i.e., the BIA's alleged failure to conduct a pre-acquisition EA). Because this issue implicates the district court's subject matter jurisdiction, we review it de novo. *See Neighbors for Rational Development v. Norton*, 379 F.3d 956, 960 (10th Cir. 2004).

The QTA "contains a limited waiver of sovereign immunity" that "allows the United States to 'be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest in water rights.'" *Neighbors*, 379 F.3d at 961 (quoting 28 U.S.C. § 2409a(a)). Notably, however, the QTA "does not 'apply to trust or restricted Indian lands.'" *Id.* "'Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the [QTA] does not waive the Government's immunity.'" *Id.* (quoting *United States v. Mottaz*, 476 U.S. 834, 843 (1986)).

"It is well settled law the [QTA's] prohibition of suits challenging the United States' title in Indian trust land may prevent suit even when a plaintiff does not characterize its action as a quiet title action." *Id.* Thus, in determining whether a particular claim falls within the scope of the QTA's prohibition, a reviewing court "must focus on the relief . . . request[ed]," rather than on the party's characterization of the claim. *Id.*

In *Neighbors*, an organization of landowners, business owners, and homeowners filed suit against the Secretary of the DOI alleging that she improperly placed into trust for nineteen Pueblos of New Mexico a parcel of land without first complying with NEPA. More specifically, the plaintiff organization alleged that the Secretary should have conducted an EA prior to taking the land into trust because she contemplated a post-acquisition change in land use (i.e., transforming the property from a site once used for an Indian school to a site for commercial office space). The district court reviewed the plaintiff organization's claim on the merits and, after initially concluding

that the Secretary's decision to accept the land into trust was arbitrary and capricious, ultimately "determined the Secretary had not acted arbitrarily and capriciously" in taking the land into trust. 379 F.3d at 960. The plaintiff organization then appealed the district court's ruling.

On appeal, this court agreed with the Secretary that the plaintiff's suit effectively challenged the United States' title to the property and thus fell within the scope of the QTA's Indian trust land exemption. In doing so, the court reviewed the legislative history of the QTA and concluded it was "clear" that "Congress' intent in excluding Indian trust lands from the [QTA's] waiver of sovereign immunity was to prevent adverse claimants from interfering with the United States' obligations to the Indians." *Id.* at 962. "Although [the plaintiff organization] [wa]s not an adverse claimant in the sense it [wa]s not seeking to gain title to the . . . property [at issue]," the court nevertheless concluded that "the Indian trust land exemption applie[d] with equal force. . . ." *Id.* According to the court, "[i]f Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land," it was "highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land." *Id.*

The court in *Neighbors* also rejected the plaintiff organization's assertion that the Secretary's decision to take the land at issue into trust was reviewable under the Administrative Procedures Act. According to the court, "judicial review is only available under the Administrative Procedures Act and [the Secretary's] trust acquisition regulations if the United States has not yet acquired title to the property." *Id.* at 964. Because the United States had "already taken title to the" property at issue, the court

concluded "judicial review [wa]s not available." *Id.* In other words, the court concluded "the Administrative Procedure[s] Act c[ould not] waive the United States' sovereign immunity because the [QTA] preclude[d] [the plaintiff organization's] suit to the extent it s[ought] to nullify the trust acquisition." *Id.* at 965.

Finally, the court in *Neighbors* rejected the plaintiff organization's request that the court permanently enjoin the Secretary from proceeding with or authorizing development of the land at issue until such time as the Secretary complied with the requirements of NEPA (i.e., by performing an EA). In the court's view, this request for relief effectively sought to have the "Secretary re-examine the decision to take the property into trust." *Id.* The court concluded, however, that "any claim seeking to re-examine issues unique to the trust acquisition [wa]s moot because the court [wa]s without authority to provide any relief." *Id.* More specifically, the court stated:

> Assuming for the sake of argument the district court considered the merits of [the plaintiff organization's] various claims and concluded the Secretary had not complied with the National Environmental Policy Act or the trust acquisition regulations, the district court could theoretically order the Secretary to now consider the appropriate factors. The district court, however, has no power to divest the United States of the property and [the plaintiff organization] does not allege the Secretary has power to reconsider its decision. Requiring the Secretary to re-examine its trust acquisition decision would not provide [the plaintiff organization] with any meaningful relief and would be a waste of agency resources – not to mention the judicial resources that would be consumed in evaluating the sufficiency of the

> Secretary's initial considerations. Since the Secretary has acquired title to the property, the issue is moot.

Id.

The impact of *Neighbors* on the instant appeal is clear. In light of the QTA's Indian trust land exemption, *Neighbors* compels us to conclude that the district court in this case lacked subject matter jurisdiction over the defendants' counterclaim and third-party claim to the extent it sought to challenge the BIA's decision to take the property at issue into trust for the Band. Thus, the district court erred (in its August 11, 2000 order) in reviewing the trust acquisition and in turn concluding that the BIA acted arbitrarily and capriciously by failing to conduct a pre-acquisition EA. The district court also erred (again in its August 11, 2000 order) in directing the BIA to conduct a post-acquisition EA and in suggesting that the effect of its order was to "invalidate the agency's decision to take the land in trust until the BIA complied with the procedural requirements of NEPA." App. at 60. As made clear in *Neighbors*, the district court clearly lacked the "power to divest the United States of the property. . . ." 379 F.3d at 965. Notably, the district court ultimately concluded (in its February 6, 2002 order), and correctly so in light of *Neighbors*, that the Indian lands exemption in the QTA rendered the government immune from questions to the title to the land at issue.

In their appellate reply brief, defendants attempt to distinguish *Neighbors* on several grounds. First, defendants assert that the QTA's Indian land exemption does not bar "judicial review of final agency action pursuant to § 704 of the" Administrative Procedures Act. Aplt. Reply Br. at 5. This assertion, however, is directly undercut by

the decision in *Neighbors*. Indeed, as outlined above, the court in *Neighbors* expressly held that the Administrative Procedures Act "cannot waive the United States' sovereign immunity because the [QTA] precludes [a] suit to the extent it seek[s] to nullify [a] trust acquisition."[5] 379 F.3d at 965.

Second, defendants assert that the instant case is distinguishable from *Neighbors* because the BIA "shield[ed] this project from known opposition. . . ." Aplt. Reply Br. at 5. In particular, defendants complain that the BIA gave notice of the proposed acquisition only to the City and not to the State of Utah. *Id.* Further, defendants complain that "[t]he City did not receive enough information to put it on notice that its outdoor advertising interests were at stake. . . ." *Id.* We disagree. To begin with, we note that the then-applicable federal regulations did not require notice to either the City or the State at the time the BIA was considering whether to accept the parcels at issue into trust for the Band. Further, notwithstanding the lack of any notification requirement, the record establishes that the BIA gave both oral and written notice to the City of the proposed acquisition. Lastly, we note that although the City allegedly raised concerns about outdoor advertising at the time it was given oral notice by the BIA of the project, the City thereafter remained silent, even after receiving written notice from the BIA regarding the proposed acquisition.

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[5] To the extent defendants cite decisions from the Eighth, Ninth, and Eleventh Circuits allegedly supporting their assertion, those cases are clearly contrary to *Neighbors* and thus are not controlling here.

Third, defendants argue that in *Neighbors*, "both the Interior Board of Indian Appeals and the District Court . . . examined the merits of whether the Secretary followed the applicable laws" in taking the property at issue into trust. Aplt. Reply Br. at 6. In contrast, defendants argue, "the procedural transgressions [in this case] have never been reviewed on the merits." *Id.* There are [at] least two flaws in this reasoning. First, although the City was given notice of the proposed acquisition, it failed to challenge the acquisition either prior to or following the BIA's approval of the acquisition. Thus, the fact that there was no review of the BIA's decision by the Interior Board of Indian Appeals rests directly on the City's shoulders. Second, the decision in *Neighbors* makes clear that the district court in that case lacked subject matter jurisdiction to review the trust acquisition. Thus, even though the district court in that case may have purported to "examine the merits of whether the Secretary followed the applicable laws" in taking the property at issue into trust, it clearly lacked authority to do so. In turn, then, defendants in this case cannot complain that they were wrongfully deprived of district court review of the acquisition.

Finally, defendants argue that, if nothing else, the decision in *Neighbors* should be reconsidered because it misinterpreted, and indeed is contrary to, an earlier decision of this court, *McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997). In *McAlpine*, an individual member of the Osage Tribe purchased two parcels of land in south-eastern Kansas and then requested that the Secretary of the DOI take the land into trust under § 465 of the IRA. When the Secretary declined to do so, the tribal member first exhausted his administrative remedies and then filed suit in federal court seeking to compel the Secretary to

accept his land in trust status. The district court dismissed the case for lack of subject matter jurisdiction, ruling that the Secretary's decision was a non-reviewable discretionary act. Alternatively, the district court concluded that the Secretary's decision was not subject to reversal because the Secretary had reviewed the relevant regulatory factors. On appeal, this court rejected the district court's ruling that the Secretary's decision was a non-reviewable discretionary act, and instead concluded that the Secretary's decision was reviewable under the APA. *Id.* at 1435.

We conclude that *Neighbors* is neither contrary to, nor requires a reexamination of, the decision in *McAlpine*. In this regard, we note that in *Neighbors*, this court expressly distinguished *McAlpine*. In particular, the court in *Neighbors* noted that the QTA "was not in play in *McAlpine* because the Secretary had not taken the title in trust." 379 F.3d at 963. "Further," the court noted, "Mr. McAlpine was not seeking to divest the United States of its title in any Indian trust land." *Id.* Obviously, we are bound by the decision in *Neighbors*, absent *en banc* reconsideration or a supervening contrary decision by the Supreme Court.

Was the EA conducted in good faith?

Defendants contend that the final EA conducted by the BIA pursuant to the district court's August 11, 2000 order was inadequate and not completed in good faith because it was conducted after the land at issue had been acquired in trust and the leases executed and approved. According to defendants, the district court should have

directed the BIA to "invalidate the approval of the five leases as well as the trust acquisition." Aplt. Br. at 19.

We conclude this issue is moot. As discussed above, the district court lacked subject matter jurisdiction over defendants' counterclaims and third-party claims to the extent they sought to overturn the trust acquisition. In turn, the district court lacked authority to direct the BIA to conduct a post-acquisition EA reviewing the environmental effects of the acquisition. Finally, even assuming, for purposes of argument, that the EA conducted by the BIA at the behest of the district court was somehow inadequate, it is immaterial because there is no basis for reversing the trust acquisition.

Applicability of Highway Beautification Act

The final portion of the district court proceedings focused on the question of whether, assuming the validity of the trust acquisition and leases, the defendants nevertheless had the right to impose restrictions on the placement of the billboards on the land at issue. The parties filed cross motions for summary judgment on this issue. In an order dated October 22, 2003, the district court granted summary judgment in favor of the plaintiffs. App. at 73. In doing so, the district court first concluded that the property at issue constituted "Indian country," as that term is defined in 18 U.S.C. § 1151 (as noted by the district court, this statute governs the applicability of federal criminal laws, but has also been held to apply to questions of civil jurisdiction). The district court then rejected defendants' assertion "that Congress ha[d] explicitly authorized the imposition of Utah's and St. George's regulatory laws over the subject property through . . . the Highway Beautification

Act of 1966 [HBA]. . . ." *Id.* at 78. More specifically, the district court "conclude[d] that even if the HBA applie[d] to the trust land at issue here," it was "subject to federal (not state) enforcement, and the [HBA] d[id] not expressly authorize the regulation intended by Utah and St. George." *Id.* at 79. Based upon these conclusions (as well as others not relevant here), the district court held "that the State Defendants ha[d] no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the" Band. *Id.* at 87. Accordingly, the district court denied the defendants' motion for summary judgment and granted the plaintiffs' cross-motion for summary judgment. *Id.*

Defendants challenge the district court's ruling on appeal, arguing that (1) the HBA is a general regulatory scheme applicable to Indian lands and thus the BIA has an obligation to enforce the HBA against Kunz, and (2) the State (via the Utah State Department of Transportation) has authority to enforce the HBA's limitations against Kunz. We review de novo the district court's grant of summary judgment. *See Croy v. Cobe Lab., Inc.*, 345 F.3d 1199, 1201 (10th Cir. 2003). Likewise, we review de novo the district court's interpretation of a federal statute, in this instance the HBA. *See Schusterman v. United States*, 63 F.3d 986, 989 (10th Cir. 1995).

a) Overview of the HBA

The HBA regulates outdoor advertising, including billboards, on or near interstate highways. It begins by declaring Congress' intent regarding the control of outdoor advertising:

> The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

23 U.S.C. § 131(a).

Because the majority of land adjacent to the interstate highway system is non-federal, the HBA creates financial incentives for the States to "ma[k]e provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising. . . ." 23 U.S.C. § 131(b). In particular, if a State does not make such provision, the HBA directs that the federal-aid highway funds apportioned to that State "shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State . . . until such time as such State shall provide for such effective control." *Id.*

The HBA outlines, in some detail, how "effective control" of outdoor advertising is to be maintained. 23 U.S.C. § 131(c). Generally speaking, outdoor advertising displays on land "outside of urban areas, visible from the main traveled way of the [interstate highway] system, and erected with the purpose of their message being read from such main traveled way," are strictly limited to "directional and official signs and notices" and must "conform to national standards . . . concerning lighting, size, number, and spacing of signs. . . ." *Id.* Greater flexibility is allowed for outdoor advertising displays that are erected "within areas adjacent to the interstate and primary systems

which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and" the federal government. 23 U.S.C. § 131(d). As noted by the federal appellees, "[t]he HBA contemplates that states will achieve compliance with [these] national standards through zoning, eminent domain, and direct regulation of land use under state law." Fed. Aplee. Br. at 46. Consistent with this notion, the HBA does not prohibit States from regulating in the area of outdoor advertising. To the contrary, it permits States to "establish[ ] standards imposing stricter limitations with respect to" outdoor advertising displays than are otherwise established in the HBA. 23 U.S.C. § 131(k).

In addition to these provisions, the HBA contains a separate provision regarding federal land:

> All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

23 U.S.C. § 131(h). Aside from this provision, no other mention is made in the HBA of federal land in general, or of land held by the federal government in trust for an Indian tribe.

b) Obligation of the BIA to enforce the HBA

Defendants first argue that the HBA, by its express language, applies to the land at issue and that the BIA "clearly had a responsibility," at least during the process of approving the trust acquisition and the leases, "to see that

the HBA was enforced." Aplt. Br. at 43. In turn, defendants argue that the billboards erected on the land "cannot meet th[e] standards" of the HBA "unless they are moved." *Id.*

A review of the record on appeal establishes that defendants did not raise this argument below. In particular, defendants' third-party claim contains no mention of the BIA having an obligation to enforce the HBA. Rather, the defendants' third-party claim speaks simply in terms of Kunz's signs failing to meet the HBA standards and the State having a right to enforce the HBA against Kunz and the Band. *See* Fed. Aplee. Supp. App. at 23-25, 34. Similarly, there is no indication in the record that the defendants ever sought to amend their third-party claim to assert an obligation on the part of the BIA to enforce the HBA. For example, although the appendix does not include any of the summary judgment pleadings filed by the parties below, the district court's order granting summary judgment in favor of the plaintiffs contains no mention of the argument now asserted by defendants. Thus, we conclude the issue has been waived by defendants. *See Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005) (noting "the general rule that issues not raised below are waived on appeal.").

[c]) Whether the State of Utah has the right to regulate the billboards

Defendants contend that, even in the absence of federal enforcement, the State of Utah "has the authority to restrict the placement of billboards on the subject property by the non-Indian lessee." Aplt. Br. at 46. More specifically, defendants argue that the State's authority in this regard arises from either (1) the HBA's express delegation of authority to

the State to enforce the limitations contained therein, or (2) the State's own police power. *Id.*

1) Express delegation of authority?

Defendants assert that the HBA expressly authorizes the State to regulate outdoor advertising displays on the land at issue. As they did below, defendants first cite to 28 U.S.C. § 131(h), which, as noted above, purports to make the HBA applicable to "[a]ll public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system. . . ." We agree with the district court, however, that even assuming § 131(h) makes the HBA applicable to land held in trust by the United States for an Indian tribe, nothing therein can be read as authorizing state enforcement of the HBA on such trust land. Rather, we agree with the district court and the Supreme Court of California that such enforcement would be reserved for the federal government. *See People ex rel. Dep't of Transp. v. Naegele Outdoor Adver. Co.*, 698 P.2d 150, 156 (Cal. 1985) (concluding the HBA contains no clear and unambiguous mandate providing for state enforcement, and further concluding that, had Congress intended for states to enforce the HBA on Indian tribal lands, "it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes.").

In a Rule 28(j) letter filed shortly before oral arguments in this case, and again during oral arguments, defendants cited to an additional provision of the HBA, 28 U.S.C. § 131(j), which they assert also expressly

authorizes state enforcement of the HBA on trust land.[6] In light of the fact that § 131(j) was in existence at the time of the district court proceedings, yet was not cited by defendants until their Rule 28(j) letter, we find it unnecessary to address the meaning of the provision and its possible impact on state enforcement of the HBA on trust land. *See Shawnee Tribe v. United States*, 405 F.3d 1121, 1128 n.6 (10th Cir. 2005) ("a 28(j) letter is not the proper mechanism to address a new argument."); *United States v. Kimler*, 335 F.3d 1132, 1138, n.6 (10th Cir. 2003) ("We will not address issues not raised in the appellant's opening brief, especially where the arguments are based on authority that was readily available at the time of briefing.").

2) The State's police power

Defendants alternatively argue that, even absent express authorization from the HBA, the State of Utah can, "acting under its own police power, . . . restrict the unlawful placement of billboards by Kunz." Aplt. Br. at 46.

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[6] Section 131(r)(2) provides as follows:

Removal of illegal signs. –

(1) **By owners.** – Any sign, display, or device along the Interstate System or the Federal-aid primary system which was not lawfully erected, shall be removed by the owner of such sign, display, or device not later than the 90th day following the effective date of this subsection.

(2) **By States.** – If any owner does not remove a sign, display, or device in accordance with paragraph (1), the State within the borders of which the sign, display, or device is located shall remove the sign, display, or device. The owner of the removed sign, display, or device shall be liable to the State for the costs of such removal. Effective control under this section includes compliance with the first sentence of this paragraph.

23 U.S.C. § 131(r).

In addressing this same argument below, the district court first concluded that the land at issue constituted "Indian country," as defined in 18 U.S.C. § 1151. App. at 75-78. Notably, defendants do not challenge this conclusion on appeal. Thus, we proceed from the assumption that the land at issue constitutes "Indian country."[7]

A state may exercise its authority over activities of non-tribal members on "Indian country" only "under certain circumstances. . . ." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983). Whether the erection and maintenance of billboards constitutes such a circumstance requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 333. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* at 334. This "inquiry is to proceed in light of traditional notions of Indian

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[7] Although the jurisdictional importance of "Indian country" originated in federal criminal statutes and other specific statutory contexts, the Supreme Court now considers "the Indian country classification [to be] the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987); *cf. Blunk v. Arizona Dept. of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999) (concluding that the Arizona Department of Transportation had authority to regulate billboards on non-reservation fee land because that land did not constitute "Indian country").

As noted, defendants have not challenged on appeal the district court's conclusion that the land at issue qualifies as "Indian country." Even if that issue had been raised, we would likely agree with the district's conclusion, given our decision in *Roberts*, where we held that a tribal complex owned by United States in trust for an Indian nation was "Indian Country" for purposes of Major Crimes Act, even though it was not formally declared a reservation. 185 F.3d at 1131.

sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *Mescalero*, 462 U.S. at 334-35).

The district court concluded, and we agree, that there are significant federal interests at play here. To begin with, the BIA has accepted the subject property into trust on behalf of the Band and expressly approved the leases of the land from the Band to Kunz. Further, the BIA has now conducted two EA's in connection with these transactions and has concluded that the erection and maintenance of the billboards will not have a significant environmental impact. Lastly, as noted by the district court, the BIA has adopted the following general policy regarding the applicability of state and local law to trust land, such as the parcels at issue:

> [N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

25 C.F.R. § 1.4(a).[8]

[8] Although there are express exceptions to this policy, none of them are applicable in this case. *See* 25 C.F.R. § 1.4(b) (outlining exceptions).

The Band's interests in the land are even more significant. Although defendants argue that the Band will derive little economic benefit from the parcels and the leases, a review of the record establishes otherwise. Prior to the acquisition and leases of the parcels at issue, the Band had only "three sources of income. . . ." App. at 200. These included (1) "a sand and gravel lease," (2) "a mining lease," and (3) "a grazing lease. . . ." *Id.* at 201. Notably, the income from these three sources was not "adequate . . . to properly operate functions of, or provide economic development for, the Band." *Id.* In early 2003, the sand and gravel lease ceased to be a source of income for the Band. *Id.* As a result, the Band's income from the leases of the parcels at issue now constitutes its greatest source of revenue. *Id.* at 201, 221. As noted in the March 2003 EA, the leases of the parcels at issue are "anticipated to have a beneficial effect on social and economic conditions of the Band by providing a long-term revenue resource and by helping to establish economic revenue for future economic development initiatives." *Id.* at 222. In addition to the revenue stream from the leases, it is uncontroverted that the Band owns the parcels at issue and, at the end of the billboard lease terms, will be free to "use the subject property as they wish." *Id.* at 83. As the district court noted, the "land in the I-15 corridor is . . . developing rapidly," thus suggesting that "ownership of the subject property will clearly be beneficial to the" Band. *Id.* Finally, and relatedly, there is some indication in the record that the Band intends to ultimately develop the parcels for housing by Band members, the majority of whom, at the present, are forced to live off-reservation due to lack of housing, resources, and employment opportunities. *Id.* at 133; *see* Supp. App. at 4.

In contrast, the State has failed, in our view, to establish that its interests in regulating the land are substantial. It is uncontroverted that, in attempting to comply with the HBA, the State passed its own law, the Utah Outdoor Advertising Act. *See* Utah Code Ann. § 72-7-501, et seq. Notably, the provisions of that Act are virtually identical to those set forth in the HBA, and thus there appears to be no unique state interest in regulating the billboards. Indeed, the State admits in its opening appellate brief that it is "regulating consistently with federal policy." Aplt. Br. at 49. Although the State suggests that its failure to regulate the billboards might result in the federal government penalizing it under the HBA by withholding federal highway funds, there is simply no evidence in the record suggesting that this is a legitimate threat, particularly given the fact that the federal government has expressly authorized the billboards at issue.

The State also suggests that the area in which the billboards are located has "unique scenic value," and that the billboards have "caused" "visual pollution. . . ." Aplt. Br. at 53. However, the district court found that the area in which the billboards are located "is already significantly developed," thereby undercutting the State's "visual pollution" argument. App. at 85. Importantly, the State has not challenged this finding on appeal.

Lastly, the State complains that if it is precluded from regulating the land at issue, the Band will effectively have been allowed to "market an exemption" from State regulation. Such a result, the State argues, will "encourage [] third parties to take advantage of the protected status of Indians." Aplt. Br. at 51. In support of its argument, the States points to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), in which

the Supreme Court upheld state taxes applied to on-reservation retail sales by non-Indians of cigarettes and tobacco products. In reaching this conclusion, the Court stated: "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155.

Two factors distinguish the instant case from *Colville*. First, unlike the situation in *Colville*, the Band in this case has not marketed an exemption from state taxation. "Thus, a central component to the reasoning of *Colville* is inapplicable here." *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 985 (10th Cir. 2004). Second, unlike the tribe in *Colville*, the record in this case clearly establishes that the Band has a significant economic interest in the land at issue and the billboard advertising that is occurring thereon. Not only are the billboard leases providing the Band with a significant portion of its current revenue, the record on appeal establishes that the land is an important asset for the Band in terms of future economic development.

In sum, balancing the federal, tribal, and State interests against one another leads us to conclude that allowing the State to exercise control over the land at issue would "threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Mescalero*, 462 U.S. at 341. Thus, we agree with the district court that the State cannot exercise its police power to regulate the land at issue.

The judgment of the district court is AFFIRMED. Appellees' Motion to Strike Appellants' Notice of Supplemental Authority is DENIED.

03-4274, *Shivwits Band of Paiute Indians v. Utah*

LUCERO, Circuit Judge, concurring.

I join in the opinion of my esteemed majority colleagues, but write separately to provide what I consider to be a missing step in the analysis. Without deciding whether the Highway Beautification Act ("HBA") applies to Indian lands, the majority concludes that if the HBA does apply to Indian lands, it is subject to federal, not state, enforcement. The problem with this reasoning is that if the HBA does not apply to Indian lands, any remaining discussion would be unnecessary. Thus, it does not appear that this is an appropriate case upon which to proceed by rhetorical assumption. The parties have directly presented and briefed the question of HBA application to Indian lands, and it is my considered judgment that we must first address that question directly. Only having decided this issue may we properly proceed to the conclusion that the state may not enforce HBA regulations on Indian lands.

We consider the question of whether the HBA applies to Indian lands under the shadow of *Federal Power Commission v. Tuscarora*, which states that "a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. 99, 116 (1960). This broad statement was not essential to *Tuscarora's* narrow holding, as the statute in question specifically addressed its application on Indian lands. *Id.* at 112. A subsequent Supreme

Court case did not apply *Tuscarora*. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that a federal statute governing oil and gas leases did not bar a tribe's power to tax and stating that "'a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent'") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). At least three circuits have interpreted the Court's statements in *Merrion* to limit the broad *Tuscarora* principle. *See Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 713 (10th Cir. 1982); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989); *United States v. Farris*, 624 F.2d 890, 893-894 (9th Cir. 1980).

Reconciling the Court's varying statements in *Merrion*, *Santa Clara Pueblo*, and *Tuscarora*, this circuit and others have acknowledged three exceptions to *Tuscarora's* rule that federal statutes of general applicability apply to Indian lands. These exceptions, pronounced in *Nero v. Cherokee Nation of Oklahoma*, are applied if "(1) the law touches 'exclusive rights of self-governance in purely intramural-matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" 892 F.2d 1457, 1462-63 (10th Cir. 1989) (refusing to find that civil rights law created a cause of action against a tribe) (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)); *see also EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (refusing to apply Age Discrimination in Employment Act because it abrogated specific treaty rights); *NLRB v. Pueblo of San Juan*, 280 F.3d

1278, 1283-84 (10th Cir. 2000) (refusing to apply section of National Labor Relations Act because doing so would abrogate tribe's right of self-government).

None of the three *Nero* exceptions apply in this case. First, the appellees do not allege that application of the Highway Beautification Act would abrogate the tribe's treaty rights. Second, they do not argue that the HBA touches the tribe's rights of self-governance in purely intramural matters. Third, the history of the statute does not suggest that Congress intended to exclude Indian lands from advertising restrictions.

Because petitioners do not establish any of the *Nero* exceptions, the *Tuscarora* general principle of applicability controls and compels the conclusion that the HBA does apply to Indian lands. I note that the Interior Board of Indian Affairs came to the opposite conclusion when addressing this question in 1979. *Morongo Band of Mission Indians v. Sacramento Area Office*, 7 IBIA 299, 1979 WL 21375 (1979). The Board's conclusion, however, turned on its finding that the term "reservation" in § 131(h) of the HBA is ambiguous, a conclusion I do not find plausible based on the plain language of the act. *See United States v. Portneuf-Marsh Valley Irr. Co.*, 13 Fed. 601, 604 (9th Cir. 1914) (holding "reservations" includes Indian reservations).

Determining that the HBA does apply to Indian lands does not answer the question as to whether enforcement of the statute is a state or federal function. Again, I agree with my colleagues that this is a federal and not a state function but write to amplify the analysis to include consideration of the statute's language.

Section 131(h) of the HBA states that the relevant lands "shall be controlled *in accordance with* the provisions of this section." 23 U.S.C. § 131(h) (emphasis added). The use of the phrase "in accordance with" suggests that the remainder of the section provides the substantive standard to be applied. It does not determine the party intended to enforce those standards. Had Congress stated that such lands should be controlled "by" the provisions of this section, perhaps the statute could be read to suggest delegation to the states to enforce HBA regulations on federal lands. However, the language "in accordance with" leaves the question of enforcement unanswered.

Because § 131(h) does not address the question of enforcement, we are guided by general presumptions regarding the application of regulations on Indian lands. There is a presumption against state jurisdiction on Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987). Indian tribes "retain 'attributes of sovereignty over both their members and their territory.'" *Id.* at 207 (quoting *United States v. Mazurie*, 419 U.S. 554, 557 (1975)). Furthermore, "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states.'" *Cabazon*, 480 U.S. at 207 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)).

Notwithstanding this presumption, states are permitted to enforce regulations when Congress explicitly delegates authority to do so. *Cabazon*, 480 U.S. at 215. The HBA includes no such delegation. The HBA is enforced through zoning and the power of eminent domain. 23 U.S.C. § 131(c), (g), (r). There is no indication that the HBA delegated to the states the right to use these powers on Indian lands. *See People ex rel. Dep't of Transp. v.*

Naegele Outdoor Adver. Co., 698 P.2d 150, 156 (Cal. 1985); *Morongo Band of Mission Indians v. Sacramento Area Office*, 7 IBIA 299, 1979 WL 21375 (1975). A previous version of the statute, on the other hand, provided for enforcement by the federal agency with jurisdiction over the public lands in question. Section 131(d) of the 1958 Highway Act, the precursor to the HBA, dealt directly with the enforcement of outdoor advertising regulations on public lands. That section stated:

> Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a).

72 Stats. 885, § 131(d), (1958). When the HBA was passed in 1965, section 131(d) was repealed and replaced by the current § 131(h). The House Report published when the HBA was passed states:

> This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same controls covering other roads which are subject to this legislation.

H.R.Rep. No. 89-1084, at 3710-3736 (1965). The California Supreme Court has interpreted this history to suggest that Congress intended the same means of enforcement to apply in the 1965 act as had applied in the 1958 act. *Naegele*, 698 P.2d at 155. Given the presumption against state enforcement, and the fact that a prior version of the statute provided for enforcement by the agency with

jurisdiction over the public lands in question, I conclude that § 131(h) requires enforcement not by the state but by the BIA.

On my independent review of the record, I also agree with the majority that the state did not argue below that the BIA had an obligation to enforce the HBA. Had the state presented this argument to the district court, I may well have reached a different conclusion than the one I come to today. Appellants having failed to do so, I agree that affirmance is appropriate.

APPENDIX B

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING, a California Corporation, Plaintiffs and Counterclaim Defendants, vs. STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation, Defendants and Counter-claimants and Third-Party Plaintiffs, vs. BRUCE BABBITT, in his capacity as Secretary of the United States Department of the Interior; ADA DEER, in her capacity as Assistant Secretary of Indian Affairs; WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS, Third-Party Defendants.	ORDER (Filed Oct. 22, 2003) Case No. 2:95CV1025TC

This case is before the court on the parties' cross motions for summary judgment. The factual and procedural background has been set forth in the parties' pleadings and in other orders of the court and will be repeated here when necessary to explain the decision. The issue for resolution is whether the Defendants (The State of Utah, the Utah State Department of Transportation, and the City of St. George, Utah, (collectively referred to as "the State Defendants")) have the authority to impose restrictions on the placement of billboards on land owned by the United States in trust for the Shivwits Band of Paiute Indians ("the Shivwits") and which is being used by a non-Indian sign company for billboard display. For the reasons explained below, the court concludes that the State Defendants do not have that authority.

ANALYSIS

I. Legal Standard

Under Federal Rule of Civil Procedure 56, a court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

II. Discussion

The question of whether the State Defendants have the authority to regulate the placement of billboards on the subject property raises issues of tribal sovereignty and

federal preemption. There is a recognized presumption against state jurisdiction in Indian country. *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *see also, Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975) (when Congress "authorized the Secretary to purchase and hold title to lands for the purpose of providing land for Indians, it understood and intended such lands to be held . . . free of state regulation."). Even so, "the Court also has recognized that state laws may reach into Indian country 'if Congress has expressly so provided.'" *Indian Country*, 829 F.2d at 976 (citing *Cabazon*, 480 U.S. at 207). Additionally, "a state may validly assert such jurisdiction even absent express consent in very limited circumstances." *Id.* (citing *Cabazon*, 480 U.S. at 215).

(A) Is the Subject Property "Indian Country"?

The threshold issue is whether the subject property is "Indian Country." The State Defendants argue that the subject property is not Indian country and therefore, they are free to impose state and local laws. *See Narragansett Indian Tribe of Rhode Island v. Narragansett Elec.* Co., 89 F.3d 908, 915 (1st Cir. 1996) (concluding that if the subject property is not Indian Country, there is no bar to the exercise of the State's jurisdiction.) The statute defining the term "Indian country" provides that

> [e]xcept as otherwise provided in sections 1154 and 1156[1] of this Title, the term "Indian country"

[1] Both sections are inapplicable to the issues in this case.

> as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.

18 U.S.C. § 1151 (2003). This statute governs the applicability of federal criminal laws, but it has also been held to apply to questions of civil jurisdiction. *See Alaska v. Native Vill. of Venetic Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States"); *DeCoteau v. District Country Court*, 420 U.S. 425, 428 n.2 (1975) (Section 1151 generally applies to questions of civil jurisdiction); *Indian Country*, 829 F.2d at 973 ("the Indian country classification [is] the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands.").

The Tenth Circuit has held that "[t]o qualify as Indian country, [the land at issue] must satisfy one of the tests of 18 U.S.C. § 1151." *HRI, Inc. v. Envt'l Prot. Agency*, 198 F.3d 1224, 1250 (10th Cir. 2000) (citing *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996)). The State argues that the subject property does not qualify as Indian Country under any of the three definitions provided by 18 U.S.C. § 1151. Although the subject property is

clearly neither (a) on a reservation nor (c) an allotment,[2] the question is whether it qualifies as a dependent Indian community.

> The Supreme Court has narrowly defined "dependent Indian communities:"
>
> We now hold that [the term "dependent Indian communities"] refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Venetie, 522 U.S. at 527. The Tenth Circuit has addressed this issue following *Venetie*, reaching the clear and unambiguous conclusion that "lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. §1151." *U.S. v Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999); *see also Oklahoma Tax Comm'n v. Citizen Band Potwatomi* [sic] *Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (test for determining whether land is Indian country depends not on formal "trust" or "reservation" status, but rather on "whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"); *HRI, Inc.*, 198 F.3d at 1249 (holding trust lands are Indian country under Supreme Court and Tenth Circuit precedent). Based on the *Venetie* decision, the *Roberts* Court

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[2] Under the relevant law, an allotment is a parcel of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians. *See United States v. Pelican*, 232 U.S. 442, 449 (1914).

determined that a trust land designation itself satisfies both federal set aside and superintendence requirements. 185 F.3d at 1132-33.

At the conclusion of its NEPA process, the Bureau of Indian Affairs ("the BIA") issued a Finding of "No Significant Impact" and stated that it would not seek to remove the land from trust status nor deny approval of the five billboard leases. Accordingly, as it now stands, the subject land is held in trust, and is clearly "Indian Country" under 18 U.S.C. § 1151.

(B) Has Congress Expressly Consented to Local and State Regulation over the Subject Property?

The State Defendants contend that Congress has explicitly authorized the imposition of Utah's and St. George's regulatory laws over the subject property through two federal statutes: (1) the Highway Beautification Act of 1966, and (2) Public Law 280.

1. Highway Beautification Act of 1966

The State argues that Congress expressly authorized imposition of state and local regulation regarding placement of billboards through the federal Highway Beautification Act of 1966 ("HBA"), 23 U.S.C. § 131 (2003). The HBA provides that

> the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

23 U.S.C. § 131(a). Central to the State Defendants' argument is the provision of the HBA that "[all public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." 23 U.S.C. § 131(h). There is little case law on this issue. Significantly, the State Defendants cite no case law to support their argument. The Shivwits rely primarily on the decision of the California Supreme Court in *People ex rel. Dep't of Transp. v. Neagele* [sic] *Outdoor Adver.*, 698 P.2d 150, 155-58 (Cal. 1985). In *Naegele*, the State of California sought to regulate sixteen billboards on land held in trust for the Morongo Band of Mission Indians. *Id.* at 151-53. California cited its Outdoor Advertising Act (the statute by which California complies with the HBA) as authority for its exercise of jurisdiction. *Id.* at 153. The California Supreme Court held that the HBA did not authorize state jurisdiction over Indian trust land, and indeed that the HBA "reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations." *Id.* at 158. Like the *Naegele* Court, this court concludes that even if the HBA applies to the trust land at issue here, the Act is subject to federal (not state) enforcement, and the Act does not expressly authorize the regulation intended by Utah and St. George.

2. Public Law 280

The State Defendants point to Public Law 280 (codified in relevant part at 28 U.S.C. §1360 (2003) as an express grant from Congress to regulate the subject property. Under Public Law 280, state laws of "general

application' are extended into Indian Country, to be applied with "the same force and effect . . . as they have elsewhere within the State." 28 U.S.C. § 1360(a). The United States Supreme Court has made clear that the relevant portion of Public Law 280 grants a state "jurisdiction over private civil litigation involving reservation Indians in state court," but not general civil regulatory authority.[3] *Bryan v. Itasca County*, 426 U.S. 373, 384-85 (1976) (holding that Public Law 280 does not authorize state and local governments to apply their regulatory laws to Indian reservations); *see also Cabazon*, 480 U.S. at 208 (citing *Bryan* for the proposition that Public Law 280 jurisdiction does not confer general civil regulatory authority). Under this rule, Public Law 280 does not provide Utah and St. George with the authority to regulate the billboards on the subject property.

[(C)] Even in the Absence of Express Congressional Consent, May the State Defendants Impose Regulations?

Even though the court has concluded that Congress did not expressly permit state or local regulation of the subject property, this does not end the analysis. Even in the absence of express Congressional permission, there are certain circumstances that permit a state to assert authority in Indian country. *Cabazon*, 480 U.S. at 215 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). Jurisdiction under such circumstances "remains the exception and not the rule," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 148 n.41 (1996).

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[3] There is no dispute that the regulations at issue here are regulatory/civil and not criminal.

The Court explained in *Cabazon* that resolution of this question

> turns on whether the state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.

Cabazon, 480 U.S. at 216 (*citing Mescalero*, 462 U.S. at 333-35).

A key factor in this analysis is that the federal government has expressly authorized this transaction, thereby showing a federal interest in the transaction. First, the BIA accepted the subject property in trust. Second, the leases to Kunz were expressly approved by the Department of the Interior in accordance with 25 U.S.C. § 415. Third, the BIA has conducted two Environmental Assessments ("EA") in connection with the transaction. *See* Shivwits Band Fee-to-Trust Land Transfer and Outdoor Advertising Leases, Final Environmental Assessment, at 1-3 (BIA March 2003) ("March 2003 EA," attached to Plaintiffs' and Federal Defendants' Cross-Motion as Ex. 9). The first EA, in 1995, assessed the environmental impacts of leasing the subject property to Kunz. The conclusion was that there was "No Significant Impact" resulting from the lease transaction. (1995 EA, attached as App. A to March 2003 EA). Following the

March 2003 EA, the BIA reaffirmed its decision to take the subject property into trust and to approve the lease to Kunz. (March 2003 EA.)

25 C.F.R. § 1.4 (2003) provides additional support for the argument that the State Defendants do not have authority to regulate the subject property. It reads that, barring an exception not relevant to this case,

> none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States.

25 C.F.R. § 1.4(a). The State Defendants challenge the authority of this seemingly clear rule, arguing that the regulation was promulgated by the Secretary of the Interior without statutory authority.[4] In support of this challenge, the State Defendants cite scholarly commentary and a district court case within the Tenth Circuit, *Norvelle v. Sangre de Cristo Dev. Co., Inc.*, 372 F. Supp. 348 (D.N.M. 1974), *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975), both of which call into question the authority of Section 1.4. However, this argument (supported by this

[4] The State Defendants further argue that Section 1.4 is inconsistent with, and superseded by, the Highway Beautification Act. However, as discussed above, the State Defendants have not demonstrated that Congress contemplated extension of the Highway Beautification Act into Indian country. Consequently, they have not shown that the HBA and Section 14 [sic] are in actual conflict.

very authority) was specifically rejected in the frequently cited case of *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665-66 (9th Cir. 1975). The *Santa Rosa* Court held that

> 25 U.S.C. § 465, which authorizes the Secretary to purchase land for the "purpose of providing land for Indians" and to take the title to such lands in trust, when read against the history of Federal policy governing use and control of Indian trust property, is sufficient to sustain [Section 1.4] as it applies to [the subject property in that case], obtained pursuant to § 465.

Id. Following *Santa Rosa*, other courts have recognized the authority of Section 1.4 under 25 U.S.C. § 465. *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 85-86 (2d Cir. 2000); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1288 (D. Kan. 2002); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 166 (D.D.C. 1980); *see also*, *U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999) (quoting *Santa Rosa*, "We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing lands for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation."). Some of these cases have explicitly announced that Section 1.4 generally exempts Indian trust lands from local zoning and regulatory requirements. *Connecticut*, 228 F.3d at 85-86; *Wyandotte*, 200 F. Supp. 2d at 1288.

A final factor in the court's analysis is the Shivwits' economic interest in the lease transactions and the subject property, as compared with the State Defendants'

countervailing interests. This factor is significant in view of Congress' "overriding objective of encouraging tribal self-government and economic development." *Mescalero*, 462 U.S. at 341. The State Defendants claim that the Shivwits have little, if any, economic stake in this affair. They correctly note that it is Kunz, not the Shivwits, who will use the subject land under the five lease agreements. Each lease agreement, it appears, extends for a twenty-year period. (*See, e.g.*, "sample lease," attached as Ex. D. to Compl. at ¶ 4.) For example, one lease requires Kunz to pay the Shivwits $1800 every year for the first fifteen years, then $2,500 per year for the last five years of the lease, for a total gain for the Shivwits of $39,500 for that particular lease. (*Id.* at ¶ 5.) The State Defendants argue that the Shivwits stand to gain, in full, roughly $60,000 from these lease agreements over the twenty-year lease term, as compared to the approximately two million dollars that Kunz stands to gain over the twenty years. According to the State Defendants, this means that it is Kunz, not the Shivwits, who recovers the lion-share of the economic gain from this land use. But in light of evidence showing that the Shivwits' total revenues for the calendar year 1999 came to $90,417, the expected revenues from the lease agreement with Kunz is not insignificant, particularly to the Shivwits. (*See* Affidavit of Band Chairman Glenn Rogers (Rogers Affid.) at ¶4 (attached to Plaintiffs' Cross-Motion as Ex. 6).) It is also highly significant that, as a result of the transaction, the Shivwits own the subject property itself. When the twenty-year lease terms are complete, the Shivwits can use the subject property as they wish. The subject property, amounting to 25.32 total acres, "[is] located adjacent to the east side of I-15 on the south end of the City of St. George, Utah, approximately 1 mile south of the Bloomington exit." (March 2003 EA at

1-1.) Because land in the I-15 corridor is now developing rapidly, ownership of the subject property will clearly be beneficial to the Shivwits. (*See* Rogers Affid. at ¶ 7)

The Shivwits present evidence showing the economic importance of the lease transactions. Band Chairman Glenn Rogers calls the subject land "a very significant asset to the Shivwits Band" and "the best thing the Band has done to raise revenue since Restoration." (Rogers Affid. at 5; *see also* March 2003 EA, at 1-3 ("The Band Council has identified and pursued this opportunity as the best foreseeable opportunity for long-term economic development. No other land was found with a greater potential for economic benefit to Band members. Additionally, the Proposed Action increases the Band's land base.")) Moreover, Mr. Rogers' affidavit describes the Shivwits' ongoing "difficult negotiations over water rights" with the State Defendants who are their opponents in this case. (Rogers Affid. at ¶ 6.) Elaborating on the water rights dispute, Mr. Rogers notes that "[a]ll economic development for the Band has been on hold waiting for us to reach a settlement – except for the I-15 billboard project. Acquiring the I-15 land is the only way we have found to begin any economic development until we obtain water rights on the reservation." (*Id.* at ¶ 6.) The Shivwits are optimistic that various development plans involving land in the area of the subject property will provide the Band itself with "significant development opportunities in addition to outdoor advertising . . . for the Shivwits parcels." (*Id.* at ¶ 7.)

On the other side of the scale, the State Defendants identify their interests as (1) preserving the natural beauty of the area, (2) maintaining a consistent billboard regulatory program throughout the state; (3) enforcing the

HBA in order to qualify for available federal highway funds; and (4) "preserving the right of local units of government to determine where commercial development will occur and to protect other areas from encroachment." (*See* Def's Mem. Supp. Mot. Summ. J. at 21.) Furthermore, the State Defendants argue that "permitting this scheme to proceed risks widespread undermining of the nationwide program of billboard regulation and perhaps other desirable regulatory programs" by encouraging "statute evading transactions" and "zoning defiance." But the court does not find these arguments persuasive for several reasons. First, the subject property is located in an area outside of St. George, Utah, which is already significantly developed. (*See* Rogers Affid. at ¶¶ 9-18 and attached Ex. 1-8.) Second, the State Defendants' argument concerning possible funding cuts by the federal government if the billboards remain is pure speculation. Third, it makes little sense that the federal government will deny the State Defendants federal funds for failing to control land which it has no authority to control. Finally, the State Defendants' "slippery slope" argument that other tribes will try to evade state zoning carries little weight in light of the procedures, including NEPA review (in which the State Defendants would be allowed to participate, through comment and otherwise), that the BIA and the Secretary of the Interior must follow before land can be taken into trust and then leased. In sum, when comparing the interests of the Shivwits and the federal government against those of the State Defendants, particularly in light of notions of Indian sovereign immunity, it is clear that the Shivwits' and the federal interests prevail.

[(D)] Have the Shivwits "Marketed an Exemption?"

The State Defendants' contend that they should be allowed to regulate the subject property because the Shivwits are "marketing an exemption." In *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court held that the state could tax on-reservation sales of cigarettes at tribal smoke shops to nonmembers of the tribe who traveled to the shops to purchase those cigarettes. The case stated a rule that federal law prohibits Indian tribes from "market[ing] an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155; *Compare Cabazon*, 480 U.S. at 219-20 (construction and operation of on-reservation gambling did not constitute marketing an exemption).

This issue is closely related to the federal preemption analysis because it involves careful scrutiny of the interests of the Shivwits in this transaction. *See Cabazon*, 480 U.S. at 219-20 (finding that because of the Cabazon and Morongo Bands' substantial economic interest and investment in allowing bingo and poker on their reservations, they were not "marketing an exception.") As discussed, the lease transactions themselves are of vital economic importance to the Shivwits. It is true that the Shivwits did not pay for the land, and that it is Kunz who profits in the main from the use of the land over the twenty-year term of the leases. But it is also true the Shivwits own the land, and will own it in fee simple at the conclusion of the lease terms. As described above, the ownership of this land provides significant economic opportunity to the Shivwits, both for the twenty-year period covered by the leases and (more importantly) when the leases conclude. On this basis, the circumstances here are different from those in

Colville, where it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Colville*, 447 U.S. at 155. Rather, the facts more closely resemble those of *Cabazon*, where "the Cabazon and Morongo are generating value on the reservations through activities in which they have a substantial interest." *Cabazon*, 480 U.S. at 220. Accordingly, the court finds that the Shivwits have not marketed an exemption by obtaining the subject land and leasing it to Kunz.

CONCLUSION

For the reasons set forth above, the court holds that the State Defendants have no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the Shivwits. The State Defendants' Motion for Summary Judgment is DENIED, and the Shivwits' and Federal Defendants' Cross-Motion for Summary Judgment is GRANTED.

SO ORDERED this 22 day of October, 2003.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District Judge

United States District Court

Central Division for the District of Utah

Shivwits Band of Paiute Indians, et al.

v.

State of Utah, et al.

JUDGMENT IN A CIVIL CASE

(Filed Oct. 22, 2003)

Case Number: 2:95cv1025TC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be granted in favor of the Plaintiffs and 3rd Party Defendants: the State Defendants have no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the Shivwits.

October 22, 2003
Date

Markus B. Zimmer
Clerk

/s/ [Illegible]
(*By*) *Deputy Clerk*

APPENDIX C

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SHIVWITS BAND OF PAIUTE INDIANS; and KUNZ & COMPANY d.b.a. KUNZ OUTDOOR ADVERTISING, a California Corporation, Plaintiffs and Counter-Claim Defendants, vs. STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation, Defendants and Counter-claim and Third-Party Plaintiffs, vs. BRUCE BABBITT, in his capacity as Secretary of the United States Department of the Interior; ADA DEER, in her capacity as Assistant Secretary of Indian Affairs; WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS, Third-Party Defendants.	ORDER (Filed Aug. 14, 2000) Case No. 2:95CV1025C

This case requires the court to determine the rights and responsibilities of various federal, state, Indian, and private actors to use or limit the use of certain property adjacent to Interstate Highway 15 within the St. George City limits. The historical and procedural backgrounds to this case are complex and raise issues of administrative and environmental law as well as federal Indian law.

This action arose after the Bureau of Indian Affairs ("BIA") took property into trust for the benefit of the Plaintiff Shivwits Band of Paiute Indians ("Shivwits Band") and approved a lease agreement between the Shivwits Band and Plaintiff Kunz and Company, d.b.a. Kunz Outdoor Advertising ("Kunz"). The parties involved in this lawsuit disagree as to whether the acquisition of the land was valid and whether the approval of the lease was valid. Assuming the acquisition and the lease were lawful, the parties disagree as to what laws may be enforced on the property. The action is before the court on three motions for summary judgment.

Factual Background

On July 16, 1993, Kunz contacted the Shivwits Band and proposed a business venture. Kunz proposed that the Shivwits Band purchase property with money furnished by Kunz. (*See* Esplin Aff. at 4, attached as Ex. A to Pls.' Mot. Summ. J.) In exchange, the Shivwits Band would agree to grant Kunz the exclusive right to place outdoor advertising signs on the property. (*See id.*)[1]

[1] According to the Complaint, the Shivwits Band entered into five leases with Kunz. A "sample" lease (attached as Ex. D to Compl.) extends for a twenty-year period. The lease requires Kunz to pay the

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The Shivwits Band agreed to the proposal, was advanced money by Kunz, and bought property on August 9, 1994. (*See id.* at 5.) The property is located in St. George City, some distance from the Shivwits Band Reservation. On the same day, the Shivwits Band conveyed the property to the United States to be held in trust for the tribe. In November 1994, the BIA determined that no environmental review was required for the act of taking the property into trust.

An off-reservation trust acquisition, like the one at issue here, must be approved by the Department of the Interior. On May 10, 1995, the Shivwits Band submitted the necessary administrative documents for approval of the trust acquisition to the BIA. The request that the property be accepted in trust was approved on August 31, 1995, by the local office of the BIA. Following acceptance of the property in trust, the parties finalized five separate leases covering the property.

Before the acquisition was approved, an environmental assessment (EA 94-3) was prepared for the act of approving the lease agreement. Following completion of EA 94-3 on July 6, 1995, a Finding of No Significant Impact ("FONSI") was reached on August 31, 1995 (the same day the acquisition decision was approved by the BIA).[2] The Secretary of Interior then approved the lease

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Shivwits Band $1800 every year for the first fifteen years. For the last five years of the lease, Kunz is required to pay the Shivwits Band $2500 per year.

[2] There was some confusion among the parties as to the date of the FONSI. (*See* United States' mem. in Resp. to Third-Party Pls.' Mot. Summ. J. at 2, ¶ 5b). According to the United States, the "correct date is August 31, 1995." (*Id.*)

agreement with Kunz on September 11, 1995.[3] (*See* Ex. 20 to Admin. R.) The billboards were built soon thereafter.

Procedural History

Defendants State of Utah, the Utah State Department of Transportation and St. George City (collectively, "Defendants") contend that the statute authorizing acquisition of the land is unconstitutional, that the acquisition of the land and approval of the lease agreements violated applicable environmental laws and procedural regulations, and that the placement of billboards on the property is unlawful under state (Utah Outdoor Advertising Act, Utah Code Ann. §27-12-136.1)[4] and local law (St. George City Code, Title 9, chapter 8).[5]

On October 25, 1995, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened criminal suit against Kunz if construction of the signs did not immediately cease. Kunz ignored the warning and continued construction. On November 3, 1995, the City of St. George issued a stop work order,

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[3] Like the decision to take the land into trust, approval of the Secretary of the Interior of the lease arrangement was necessary to give the leases effect. *See* 25 U.S.C. § 415.

[4] The statute designates certain areas where outdoor advertising may be placed. In addition, Defendants contend that the signs violate State law because Plaintiffs lack a valid State permit as required by Utah Code Ann. § 27-12-136.7(1). The placement or maintenance of the signs would be a criminal misdemeanor under Utah Code Ann. § 27-12-136.12.

[5] St. George City Code §§ 9-8-4(B)(4) and 9-8-2(Q) govern off-premise signs. The Defendants allege that the Plaintiffs' signs violate these Code sections because they do not comply with spacing requirements and would not meet any of the exceptions for allowance of signs.

forbidding Kunz from further construction of the signs on the ground that it violated city and state outdoor advertising regulations and Kunz had no city or state sign permits.

On November 17, 1995, Kunz and the Shivwits Band (collectively, "Plaintiffs") sued for declaratory judgment and preliminary and permanent injunctive relief against the Defendants. Plaintiffs' lawsuit seeks (1) an order declaring that the property is lawfully held, and (2) injunctive relief restraining Defendants from interfering with the construction and operation of the billboards.

On November 22, 1995, Defendants filed a counterclaim against Plaintiffs and a third-party claim against Bruce Babbitt, Ada Deer, Walter Mills, and the BIA (collectively "Third-Party Defendants"). The counterclaim and third-party claim allege that (1) the statute authorizing land acquisitions, 25 U.S.C. § 465 (and the accompanying regulation, 25 C.F.R. § 1.4), is unconstitutional; (2) the taking of the land in trust and the approval of the lease were wrongly accomplished because the Third-Party Defendants violated the National Environmental Policy Act ("NEPA") and Department of Interior ("DOI") regulations; and (3) the erection of billboards on the property violates certain state and local regulations.[6]

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[6] The three causes of action listed above summarize the nine causes of action actually outlined in the counterclaim and third-party claim. As listed by the Third-Party Plaintiffs, the nine claims for relief are: (1) 25 U.S.C. § 465 is unconstitutional; (2) violation of 25 C.F.R. § 151 and 25 C.F.R. § 2.7; (3) violation of Utah Code Ann. §§ 27-12-136.1, 136.40), 136.7; (4) violation of St. George City Code §§ 9-8-4(B)(4) and 9-8-2(Q); (5) violation of 25 U.S.C. § 766(d); (6) violation of NEPA in connection with the acceptance of lands into trust; (7) violation of 25 U.S.C. § 465 and the applicable regulations; (8) violation of NEPA in connection with the approval of the leases; and (9) injunctive relief. The

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On September 18, 1996, the parties agreed to delay the proceedings pending the Supreme Court's consideration of a decision by the Eighth Circuit Court of Appeals, which had found 25 U.S.C. § 465 an unconstitutional delegation of legislative power. *See State of South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995). (Section 465, as mentioned above, and discussed below, allows the government to take land into trust for Indian tribes). On October 15, 1996, the Supreme Court vacated the Eighth Circuit decision and remanded. See *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996). Following the Supreme Court's decision, the parties filed the pending motions for summary judgment.

Pending Motions

The three groups of parties have all moved for summary judgment. In support of their motions, the parties make the following arguments:

(1) *Third-Party Defendants*: (1) the court lacks subject matter jurisdiction over the Third-Party Defendants for certain claims because there has been no waiver of sovereign immunity;[7] (2) the Third-Party Defendants fully complied with statutes and regulations applicable to taking land into trust and approving the lease agreements; and (3) the lands held in trust for the

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third cause of action is brought only by the State of Utah and the fourth cause of action is brought only by the City of St. George. The other seven causes of action are brought by all counterclaim and third-party Plaintiffs.

[7] The Third-Party Defendants' sovereign immunity defense does not apply to violations of NEPA claims and is, therefore, not considered in this order.

Shivwits Band are Indian Country and not subject to federal, state, or local law and regulation.

(2) *Plaintiffs*: (1) the Shivwits Band followed all required procedures under 25 U.S.C. § 465 in taking the lands into trust; (2) federal, state, and local laws are not enforceable on the property under federal law and the principle of federal preemption; and (3) no federal laws authorize regulation of billboards on Indian Lands.

(3) *Defendants*: (1) 25 U.S.C. § 465 is an unconstitutional delegation of legislative power; (2) the taking of the property in trust and the approval of the sign lease by federal officials was improper because (a) it occurred without the required consideration of environmental laws and/or (b) the Secretary of the Interior did not follow the required procedures; (3) even if the property is properly held in trust, there is no sufficient basis for exempting the land from applicable federal, state, and local laws restricting the placement of outdoor advertising; and (4) involvement of the Shivwits Band solely to validate the billboards constitutes "marketing an exemption," a practice the Supreme Court has held invalid.

Analysis

A. 25 U.S.C. § 465

In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. § 461, et seq., with the purpose of protecting Indians and encouraging and fostering self-government by the various Indian tribes. *See, e.g., Cheyenne River Sioux Tribe v. Kleppe*, 424 F.Supp. 448 (D. S.D. 1977), *rev'd on other grounds*, 566 F.2d 1085 (8th Cir. 1977). Of particular importance to this case is 25 U.S.C. § 465, a broad delegation of power concerning the acquisition of property in trust:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, . . . any interest in lands . . . within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.
>
> . . .
>
> Title to any lands or rights acquired pursuant to [this and other sections of this title] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id.

Defendants argue that the statute is an unconstitutional delegation of legislative power because it contains no limits on the amount of land to be taken and has no ascertainable standards against which a reviewing court can test the exercise of the delegated power. The Tenth Circuit has squarely rejected this argument, acknowledging that the statute itself places limits on the Secretary's discretion. *See United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), *cert. denied* 120 S.Ct. 1960 (2000). Therefore, 25 U.S.C. § 465 is constitutional.

B. Compliance with NEPA

The BIA did not prepare an environmental impact statement ("EIS") or environmental assessment ("EA") in connection with the acceptance of the land into trust. The BIA did, however, prepare an EA in connection with the approval of the lease between Kunz and the Shivwits Band. Defendants contend that the BIA was required to

prepare an EA (at least) for the acquisition of the property.[8] Plaintiffs and Third-Party Defendants respond that no NEPA review was necessary for the land acquisition, or, alternatively, that the EA prepared in connection with the lease approval satisfies any NEPA requirements for the acquisition of the land.

1. Standard of Review

NEPA requires federal agencies to evaluate the environmental impacts of federal actions. *See* 42 U.S.C. § 4332. The Administrative Procedure Act ("APA") sets forth the standard of review to be applied by courts in reviewing agency actions. Among other things, the APA directs courts to hold unlawful agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Generally, an agency decision will be considered arbitrary and capricious if 'the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997) (internal citations omitted). Under an arbitrary and capricious standard, a court may disapprove of an agency's decision only if the agency

[8] This is only one of many violations the Defendants allege. Due to the conclusion on this issue, the court does not address the Defendants' further arguments at this time. *See United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 699 (10th Cir. 1999) ("It is fundamental that federal courts do not render advisory opinions. . . .").

made a "clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

2. Categorical Exclusion

In general, an EA or EIS is required for every agency action unless the action is entitled to categorical exclusion ("CE") status. *See Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1435 (10th Cir. 1996) ("For proposed actions the environmental effects of which are uncertain, the agency must prepare an [EA] to determine whether a significant effect will result from the proposed action.").[9] CEs are categories of actions which do not, individually or cumulatively, have a significant effect on the human environment and therefore, do not require an EA or EIS. *See* 40 C.F.R. § 1508.4 ("[N]either an environmental assessment nor an environmental impact statement is required" when a CE applies.). As explained in the Department of Interior Manual,

> *An EA will be prepared for all actions, except those covered by a categorical exclusion,* covered sufficiently by an earlier environmental document, or for those actions for which a decision has already been made to prepare an EIS. The purpose of an EA is to allow the responsible official to determine whether to prepare an EIS.

516 Dep't Manual 3.2 (emphasis added). (Portions of the Department Manual are attached as Exhibits B-E to

[9] As noted below, an EA is not required when the action is "covered sufficiently by an earlier environmental document" or when the agency has already decided to prepare an EIS. 516 Dep't Manual 3.2. None of the parties contend that any exception (other than the a CE) applies in this case.

Defendants' Supplementary Memorandum.) According to a BIA Manual (titled "NEPA Handbook"), the actions that are entitled to CE designation are those that:

> have been determined not to individually or cumulatively affect the quality of the human environment and, therefore, they do not normally require preparation of either an EA or EIS. However, exceptions may exist in which a normally excluded action may result in significant effects upon the environment, and in such cases an EA or EIS must be prepared. . . . If there is any doubt whether an exception applies, an EA should be prepared.

30 BIA Manual Suppl. 1, 3.2(A). (Portions of the BIA Manual are attached as Exhibits A to Defendants' Supplementary Memorandum.)

The decision to apply a CE is reviewed under the usual arbitrary and capricious standard. *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) ("An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious."); *Hells Canyon Preservation Council v. Jacoby*, 9 F.Supp.2d 1216, 1232 (D. Ore. 1998) (same).

The Defendants argue that the decision to categorically exclude the act of acquiring the property was arbitrary and capricious since no CE applies to that agency action. In a two-page "Categorical Exclusion Checklist" ("Checklist") dated November 15, 1994, BIA representatives concluded that the proposed action (the taking of the property into trust) was entitled to a CE designation. (The

Checklist is attached as Exhibit 7 to the Administrative Record.)[10]

Since the Checklist does not clearly identify any basis for a CE, the first issue is whether there is any CE that applies to decisions to acquire land.[11] According to the BIA Manual, CEs are those actions listed in 516 Department Manual 2, Appendix 1 and 516 Department Manual 6, Appendix 4.4. *See* 30 BIA Manual Suppl. 3.2.

516 Department Manual 2, Appendix 1 lists eleven CEs, and none apply to acquisition of land. (This document is attached as Exhibit C to Defendants' Supplementary Memorandum.) 516 Department Manual 6, Appendix 4 lists five CEs. (This document is attached as Exhibit E to

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[10] Although the Checklist mentions the lease agreement, it is clear that the Checklist means to categorically exclude the land acquisition, not the lease arrangement. Under the heading "Brief description of proposed action," for example, the document reads, "The Shivwits Band of Paiute Indians is requesting two small parcells [sic] of newly acquired property be taken into trust."

[11] The discussion in the "Explanation and/or remarks" section of the Checklist is of little help. In its entirety, this section reads:

> 516 DM 2.3A(3) Applicable or not applicable
>
> 516 DM 6 App. 4 – Not Applicable
>
> 30 BIAM Suppl., 3.2A BIA C.E. In Addition to
>
> 516 DM 2.3A(3) –
>
> 4.4 I.2. The Shivwits Band plans to lease 5 sign spaces for outdoor advertising. This will give the Band the opportunity for economic development and much needed income now and in the future. There is the possibility for future economic development when the surrounding area is developed.

The last reference to "4.4 I.2" likely refers to 516 Department Manual 6, Appendix 4, paragraph 4.4(I)(2). As set forth below, paragraph 4.4(I)(3) is the more appropriate exclusion, not 4.4(I)(2).

Defendants' Supplementary Memorandum.) 516 Department Manual 6, Appendix 4, paragraph 4.4(I) identifies "Land Conveyance" as a CE, and appears to be the only possible relevant exclusion:

> The following BIA actions are hereby designated as categorical exclusions. . .
>
> (1) Land transfers from Federal or State Agencies or other DOI Bureaus to the BIA as land to be held in trust for the Indian tribe(s) involving no development, physical alteration, or change in land use.
>
> (2) Purchase, sale, abandonment or exchange of tracts of land, mineral rights or other interests in land in which no change in land use or operation is planned.
>
> (3) Lands acquired pursuant to 25 U.S.C. 465 . . . *where no development, physical alteration, or change of land use after acquisition is known or planned.*

Id. (emphasis added). Although the Checklist does not clearly identify its basis for a CE, the only arguable ground for an exception is the exclusion identified in 516 Department Manual 6, Appendix 4, paragraph 4.4(I)(3) (hereinafter "4.4(I)(3)").

Having concluded that a CE *could* apply to the agency action, the next issue is whether the action in this case falls within the scope of that CE. By its own terms, 4.4(I)(3) does not apply when "development, physical alteration, or change of land use after acquisition is *known or planned.*" *Id.* (emphasis added). Here, the Kunz-Shivwits Band lease was clearly contemplated at the time the land was acquired. (Indeed, the Checklist itself reveals

that the BIA knew of the billboard lease at the time of acquisition.) Under its express terms, then, 4.4(I)(3) would not categorically exclude the land acquisition from NEPA review.

Plaintiffs and Third-Party Defendants contend, however, that 4.4(I)(3) does apply because the BIA (and the DOI) interprets 4.4(I)(3) to grant "CE status so long as appropriate NEPA analysis is performed *before* such a change in land use takes place." (Joint Suppl. Mem. at 3) (italics in original.) As discussed below, an EA regarding the leasing arrangement was completed on July 6, 1995 (before the change in land use (i.e., the construction of the billboards) took place). If Plaintiffs and Third-Party Defendants' interpretation of 4.4(I)(3) is correct, then, the CE would be valid since an EA was performed before the change in land occurred.

When reviewing an agency's application of its own regulation, the agency's interpretation of its regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 509 (1994); *Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999); *Southern Utah Wilderness Alliance v. Dabney*, 7 F.Supp.2d 1205, 1209 (D. Utah 1998). "In other words, [a court] must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ.*, 512 U.S. at 509 (internal citations omitted).

In support of their contention that 4.4(I)(3) affords CE status for all land acquisitions so long as NEPA review

takes place before any contemplated change in the land, Plaintiffs and Third-Party Defendants cite three sources. First, the parties cite 61 Federal Register 67845, 67845-46 (Dec. 24, 1996), which summarizes comments and responses on 516 Department Manual 6, Appendix 4:

> *Response*: It is unrealistic to expect land to be conveyed with no plan whatsoever for its future use. Whether or not the conveyance may be categorically excluded is a matter of judgment by the BIA official responsible for NEPA compliance as to how well the plan is established. The categorical exclusion does not, however, allow for any development or physical alteration to actually take place. *Comment*: Recommendation that all land transfers be categorically excluded, regardless of plans for future development or physical alternation, so long as the subsequent activity will be subject to NEPA review.
>
> *Response*: This is in fact the way the categorical exclusion is meant to operate. What the BIA official responsible for NEPA compliance must decide is whether or not plans for development or physical alteration are established to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer.

Id. (This portion of the Federal Register is attached as Exhibit A to the Joint Supplemental Memorandum.)[12]

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[12] As noted above, the Checklist is dated November 15, 1994, well before the publication of this comment and response. There is, however, no reason to believe that the interpretation of 4.4(I)(3) would have been different in 1994.

Next, the parties cite a June 9, 1995 letter from the BIA Phoenix Area Director stating that "Our Branch of Environmental Quality Services has advised that the proposed acquisition may be considered to be a categorical exclusion under NEPA, now that we have amended the [CE] checklist to indicate that '[further environmental documentation will be competed [sic] at the time of leasing.'" (This letter is attached at Exhibit 12 to the Administrative Record.)

Finally, Plaintiffs and Third-Party Defendants cite the declaration of Wayne Nordwall, Director of the Western Regional Office of the BIA. (Nordwall's declaration is attached as Exhibit C to the Joint Supplementary Memorandum.) According to Nordwall,

> The [DOI] has identified trust acquisitions as categorically excluded actions where there will be no immediate change in use of the land. . . . Since the two parcels were being acquired for economic development, this office amended the Checklist to make it clear that environmental documentation (an EA or EIS) would be necessary at the time of leasing. This is a normal procedure of the [BIA] when a change in use for the land is known, but the change will not occur until some time after the land will be taken into trust.

(Nordwall Decl. ¶ 5.)[13]

Although the BIA and DOI agree that "all land transfers be categorically excluded, regardless of plans for future development or physical alternation, so long as the

[13] The last two sources are of limited value since they do not refer to written agency policy, but rather opinions of agency employees.

subsequent activity will be subject to NEPA review," the DOI's own interpretation of 4.4(I)(3) articulates an express limitation: "Whether or not the conveyance may be categorically excluded [depends on] *how well the plan is established*. . . . What the BIA official . . . must decide is *whether or not plans for development or physical alteration are established* to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer." 61 Fed. Reg. 67845 (emphasis added). A fair interpretation of these sentences is the following: if the plans for land development are sufficiently "established," NEPA review of the land change decision should take place at the same time the land is acquired. In that case, 4.4(I)(3) would not categorically exclude the act of acquiring the land, and NEPA review for both actions would be necessary. If, on the other hand, the plans for development are not sufficiently "established," the CE applies and no NEPA review is necessary for the acquisition itself.

Even assuming the DOI's interpretation is reasonable,[14] 4.4(I)(3) would not categorically exclude the acquisition of the property in this situation. Kunz contacted the Shivwits Band as early as July 16, 1993 to discuss a leasing arrangement, and a lease was executed by May of 1994. By August 1994, the land had been conveyed to the United States to be held in trust. By the time the Checklist was completed on November 15, 1994, the procedures necessary to finalize both the land acquisition and the lease were well underway. In addition, BIA officials were

[14] This interpretation does not readily flow from 4.4(I)(3) itself, which appears to apply only when no development is "known or planned." Based on the analysis below, however, the court need not decide whether the DOI interpretation is reasonable or not.

well aware of the pending leasing arrangement at the time the land was taken into trust and before the Checklist was finalized. This was not a case where land was acquired with some undefined plan of future land development; rather, this is a case where preparation for the future land development *preceded* the land acquisition itself, and was well "established" when the land transfer was being considered.

The Checklist offers no justifiable basis that would support the decision to forego NEPA review of the land acquisition in this case. There is no reasonable basis supporting the conclusion that 4.4(I)(3) applies and no reasonable rationale is offered by the parties. Hence, by the express terms of 4.4(I)(3) and the DOI's own interpretation of that CE, the acquisition of the land was not entitled to CE status. The decision to categorically exclude the land acquisition was, therefore, arbitrary and capricious.

3. EA 94-3

Since no CE applied to the acquisition of the property in this case, NEPA review was required for that act. *See* 516 Dep't Manual 3.2. Plaintiffs and Third-Party Defendants contend that the EA completed for the billboard lease (i.e., EA 94-3) was adequate to satisfy any required NEPA review of the land acquisition. (EA 94-3 is attached as Exhibit 16 to the Administrative Record.) First, Plaintiffs and Third-Party Defendants note that EA 94-3 was completed on July 6, 1995, nearly two months before the land was taken into trust on August 31, 1995. Since EA 94-3 was completed before the land acquisition, Plaintiffs and Third-Party Defendants contend that that NEPA

review includes both the lease approval and the acquisition of the land. Second, Plaintiffs and Third-Party Defendants stress that "because the trust decision did not itself involve any physical alteration of the property, [the decision to acquire the land] alone does not add any potential element of significant environmental impact that should be analyzed in an EA that was not already analyzed in the EA for the leases." (Joint Suppl. Mem. at 7.) Hence, "remanding the trust decision to the agency for a separate EA would serve no meaningful purpose, because the pertinent issues were already addressed in the billboard lease EA which was prepared before the trust decision was made." (*Id.* at 9.) These points are taken in turn below.

First, Plaintiffs and Third-Party Defendants contend that EA 94-3 includes both the decision to acquire the land and the decision to approve the lease. EA 94-3, however, focuses exclusively on the lease itself, not the acquisition of the land. Under the heading "Purpose and Need," the document states that "Kunz . . . has submitted a request for a lease to erect five (5) outdoor advertising signs [on] property that is being purchased by the Shivwits Band of Paiute Indians" (EA 94-3 at 1.) Under the heading "Proposed Action and Alternatives," the document reads, "The proposal is for a 15-year, renewable, lease for five sign sites for the erection of five 14' x 48' outdoor advertising signs." (*Id.*) In its discussion of "Environmental Consequences," EA 94-3 focuses on the environmental effects of sign construction, access to signs, and sign maintenance. (*See id.* at 3.)[15]

[15] This conclusion is not surprising given the fact that the act of acquiring the land had been categorically excluded in November 1994.

No part of the EA discusses the land acquisition itself. In fact, although the first page of the EA states that the property "is being purchased by the Shivwits," a subsequent sentence indicates that the Shivwits Band have already completed the purchase: "The land *now belongs to the Shivwits Band. . . .*" (*Id.* at 1, 4.) Since EA 94-3 applied only to the approval of the lease, not the acquisition of the land, the EA does not satisfy the NEPA review required for the acquisition of the land itself.[16]

Plaintiffs and Third-Party Defendants next claim that the decision to acquire the property did "not add any potential element of significant environmental impact that should be analyzed in an EA that was not already analyzed in the EA for the leases." (Joint Suppl. Mem. at 7.) However, according to the DOI regulations that have been discussed above, only some land acquisitions are categorically excluded, and none apply in this ease. Consequently, the Third-Party Defendants were required to conduct an EA to evaluate the possible environmental implications of acquiring the land, and their failure to do so violates NEPA.

The failure to comply with the procedural requirements of NEPA is more than de minimus and does not (as Plaintiffs and Third-Party Defendants contend) "elevate form over substance." *Id.* "NEPA has twin aims. First, it 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.'

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[16] The subsequent FONSI supports this conclusion. Dated August 31, 1995, the FONSI clearly applies only to the lease, not the land acquisition. The document begins by stating that "The Shivwits Band of Paiute Indians propose to lease to Kunz and Company five (5) sign sites . . . ," and does not mention the acquisition of land itself.

Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citations omitted); *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 705 (3d Cir. 1999) ("NEPA ensures that an agency has before it detailed information on significant environmental impacts when it makes its decisions and guarantees that this information is available to a larger audience."); *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543, 1554 (10th Cir. 1993). The way in which NEPA achieves its goals is through procedural requirements. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA "does not mandate particular results," but it does "prescribe the necessary process."); *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994) ("NEPA does not mandate particular substantive results, but instead imposes only procedural requirements.").

The failure to prepare any NEPA review of the land acquisition was a procedural harm that frustrated NEPA's goals: for example, relevant information was not made available to the wider audience participating in the agency decision-making process prior to the agency action and members of the public were denied sufficient opportunity to submit comments. *Cf. Laguna Greenbelt, Inc.*, 42 F.3d at 527 (finding that the NEPA violations did not frustrate NEPA's goals when an incomplete EA was prepared since the public had sufficient information and was able to comment about the proposed action before the final decision was made). This is not a case where an arguably imperfect EA was prepared or the agency's decision to not

prepare an EIS is at issue. In this case, the agency decided not to conduct any environmental analysis at all. The BIA violated the procedural requirements of NEPA; therefore, the agency action must be invalidated.

Conclusion

Based on the analysis above, the court concludes that the failure to prepare an EA in connection with the acquisition of the land violated the procedural requirements of NEPA. The court therefore GRANTS Defendants' motion for summary judgment in part and orders that the required NEPA process be undertaken. *See Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (requiring that defendants set aside a wrongly-reached FONSI, and "begin the NEPA process afresh [by preparing] a new EA").

SO ORDERED this 11 day of August, 2000.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District
Judge

APPENDIX D

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual

Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH CENTRAL DIVISION

EXHIBIT
D

BILLBOARD LEASE 4272NS

This lease made and entered into this first day of September, 1996 by and between the Shivwits Band of Paiute Indians, a federally recognized Indian Tribe (hereinafter referred as the "Tribe"), as Lessor, and Kunz & Company, a California corporation (herein called "Lessee"), under the provision of the Act of August 9, 1955, as amended (69 Stat. 539; 25 U.S.C. § 415), as implemented by 25 C.F.R. § 162, and any amendments thereto relative to business leases on restricted lands.

WITNESSETH

That in consideration of the mutual covenants and agreements hereinafter set forth and the rents to be paid as specified in this agreement, the Tribe hereby leases, rents and lets unto Lessee, its successors and assigns, exclusive use at the premises herein described necessary for the placement of one 14X48, two sided, illuminated, monopole billboard structure which shall be located adjacent to the east line of the right-of-way of Interstate 15, 1.2 miles south of Bloomington (Exit #4), Washington County, Utah and which is designated as number 4272NS on the attached plot plan, which it incorporated herein and made part of this lease.

The term "premises" as used herein shall mean that portion of the real property where Lessee's structure is

placed. The term "real property" as used herein shall mean the following described real property, as a portion of the Shivwits Band of Paiute Indian Reservation, lying in the NW 1/4, SE 1/4 of Section 13, Township 43 South, Range 16 West, Salt Lake Base and Meridian.

1. The leased premises shall be used solely for the placement of a billboard for advertising purposes. Lessee agrees not to permit the billboard to be used for the advertisement of any morally offensive or unlawful purpose.

2. All materials placed on said premises by Lessee shall be maintained in a good and workmanlike manner.

3. The Tribe hereby grants to Lessee the right to construct, illuminate, maintain and remove the billboard, and to enter upon the Shivwits Band of Paiute Indian Reservation for such purposes.

4. The term of this lease shall be twenty (20) years from the date of erection of the billboard; which shall not occur later than twelve (12) months following approval of this lease by the Secretary of Interior. This lease shall terminate if not approved by the Secretary of the Interior within thirty-six (36) months of this date.

5. As rental for the leased premises, Lessee shall pay to the Tribe the sum of $1,800.00 (eighteen hundred and 00/100) per year from the date of erection of the billboard as rent for years one through fifteen and $2,500.00 (twenty-five hundred and 00/100) per year for years fifteen through twenty. The sum of $27,000.00 shall be payable upon the execution of this lease, which sum shall represent advance rent to be applied to the first 180 (one hundred eighty) months from the date of erection of the

billboard. If the lease is terminated by either party, all such prepaid and unearned rentals shall be applied to any other such lease agreements in effect between the parties hereto, if any.

6. The Lessee shall save the Tribe harmless from all damages to persons or property by reason of accidents from the negligent acts of its agents, employees or others employed in the construction, maintenance, repair, or removal of its billboard on the property.

7. The parties agree that the exact location of future advertising signs or advertising matter relating to present or future Tribal business enterprises within one thousand (1000) feet of the subject billboard shall be mutually agreed to by the parties hereto. Tribe further agrees that, during the term of this lease, lessee shall have the exclusive right to place billboards viewable from the traveled way of Interstate 15 on any real property in which the Tribe has an interest.

If the view of the subject billboard is obstructed or its value wholly or partially impaired, or the use of the subject billboard is prevented by law, Lessee may proportionately reduce the rental or cancel this lease and receive a pro-rate refund of prepaid rent by giving notice in writing of such impairment, obstruction or prevention of use.

8. The Tribe shall have the right to terminate this lease at any time during the period of this lease if the Tribe is to improve the premises by erecting thereon a permanent private, commercial or residential building. Lessee shall elect to remove or relocate its billboard at the Lessee's expense within ninety (90) days after receipt of a written notice from the Tribe that such construction is to occur. If

relocation is not elected, the Tribe will return to the Lessee a pro-rata refund of prepaid rent. All materials placed on said premise by Lessee shall remain the property of the Lessee and may be removed by the Lessee at any time. Lessee may terminate this lease at any time with a ninety (90) day written notice to the Tribe.

9. The Tribe represents that it is the beneficial owner of the property covered by this lease and has the authority to execute this lease, subject to the approval of the Secretary of the Interior. All rents to be paid pursuant to this lease, and all notices are to be forwarded to the Tribe at the address noted below.

10. This lease shall constitute the sole agreement of the parties relating to the lease of the above described property. Neither party will be bound by any statements, warranties, or promises, oral or written, unless such statements, warranties or promises are set forth specifically in this lease.

11. Unless otherwise provided herein, a sublease, assignment, or amendment of this lease may be made only with the approval of the Secretary of the Interior and the written consent of all parties to this lease.

12. It is understood and agreed between the parties hereto that if any installment of rental is not paid within thirty (30) days after becoming due, interest at the rate of ten (10) percent per annum will become due and payable from the date such rental became due and will continue until said rental is paid.

13. Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the Issuance of a fee patent or

otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The Tribe and Lessee shall be notified by the Secretary of the Interior of any change in the status of the land.

14. No Member of, or Delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

15. It is understood and agreed that violations of this lease shall be acted upon in accordance with 25 C.F.R. 162.

16. No assent, express or implied, to any breach of any of the covenants, shall be deemed to be a waiver of any succeeding breach of any covenants.

17. It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the Lessee's obligations under this lease, and the obligations of its sureties, are to the United States as well as to the Tribe.

18. It is further understood and agreed between the parties hereto that this lease shall be valid and binding only after approval of the Secretary of the Interior.

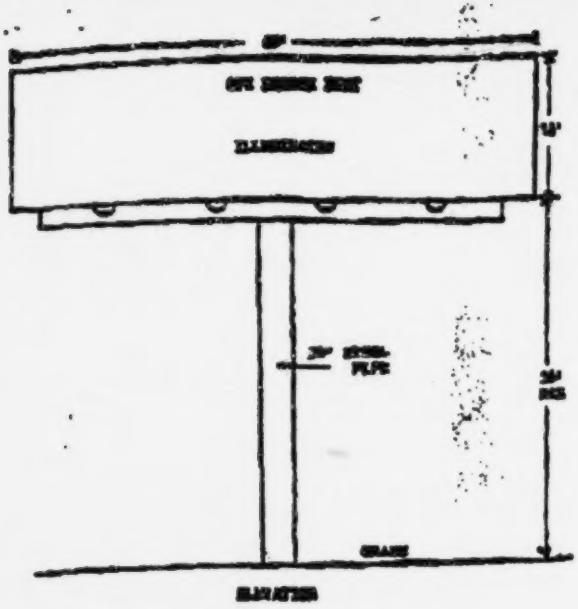
19. It is further agreed and understood between the parties that by executing this lease the Tribe does not surrender, waive, or impair any right, privilege or immunity secured to it as a federally recognized Indian Tribe.

ACCEPTED: KUNZ & COMPANY, LESSEE	ACCEPTED: SHIVWITS BAND OF PAIUTE INDIANS
By: /s/ _____	By: /s/ _____
Title Vice-President	Title: Shivwitz Band Chairman
Address: 1831 Commercenter East San Bernardino, CA 92408	Address: P.O. Box 448 Santa Clara, Utah 84765
Telephone: 714-888-0018	Telephone: 801-673-8270
Date: 5/2/94	Date: 5/13/94

APPROVED BY THE SECRETARY OF INTERIOR

/s/ _____

Date: 9-11-95



KLEIN
OUTDOOR ADVERTISING

TOM HANAGAN

4272 NS

I-15 East Line 1.2 miles
South of Bloomington (Exit #4)
SEC 13, T4S, R16W

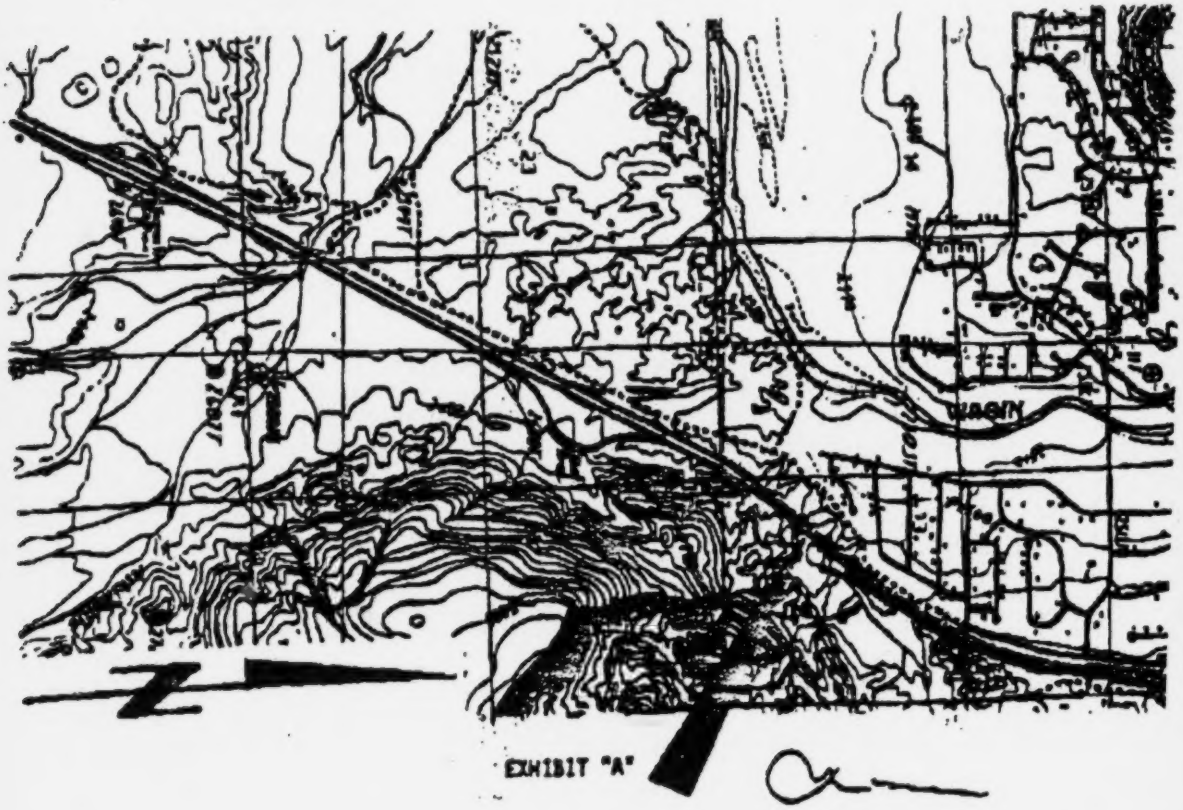


EXHIBIT "A"

APPENDIX F

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FAX: (801) 628-5225
J,W,H&Mc File No.: 3668.0001

Dale T. White
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Attorneys for Plaintiff Shivwits Band
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Boulder, CO 80302
Telephone: 303-443-1683

IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH

CENTRAL DIVISION

SHIVWITS BAND OF PAIUTE INDIANS, KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING, a California Corporation;	AFFIDAVIT OF PAUL D. HELD
Plaintiffs,	(Filed Nov. 17, 1995)
vs.	Case No.: 2:95CV 1025S
ST. GEORGE CITY, a Utah Municipal Corporation,	Judge:
Defendant.	

COUNTY OF SAN BERNARDINO)
) SS
STATE OF CALIFORNIA

Affiant Paul D. Held being sworn upon oath testifies and states:

1. I am an adult resident of San Bernardino County, California. I am a Vice president and general manager of Kunz & Company, d/b/a Kunz Outdoor Advertizing (Kunz), a California corporation which owns and leases outdoor advertising signs in the City of St. George, Washington County, Utah. As Vice President and general manager I have direct oversight responsibility for the five outdoor advertising signs and leases that are the subject of the above-captioned law suit. The statements set forth herein are based on personal knowledge and my own personal review of the subject leases.

2. Kunz has enetered into five leases with the Shivwits Band of Paiute Indians, dated September 1, 1995, providing Kunz the right to construct and install outdoor advertising displays south of Exit 4, the Bloomington exit, along the east side of Interstate 15 in St. George, Utah. On or about November 1, 1995, Kunz commenced construction of five double faced outdoor billboards at this location on the Shivwits Band Trust property.

3. On or about November 3, 1995, St. George City issued a "Stop Work Order" purporting to forbid Kunz from further work on construction of the signs on the basis that the proposed signs violated applicable City and Utah State regulations.

4. Kunz has presold all five north faces of the signs (viewable by southbound traffic) at $600.00 per month per face; which now appears to be below market. Kunz has presold three of the five south spaces (viewable by northbound traffic) for the sum of $1750.00 per month per face. In addition, there is considerable interest in the

remaining two south faces by such entities as Ence Homes in St. George. Each advertising contract is for a three year term and has an annual escalator clause based upon the increase in the consumer price index.

5. Once the structures are erected, the additional cost to maintain the advertising displays over and above Kunz's existing overhead, are minimal. Out of the monthly anticipated gross for each structure of $2,350.00 per month, the net income to Kunz should be approximately $1850 per sign. This translates to an annual approximate present net income of $111,000.

6. The leases between the Shivwits Band of Paiute Indians and Kunz are each for a period of twenty years. Due to the growth of the St. George and Mesquite markets, I anticipate that the value of the sign faces will increase considerably faster than the consumer price index in the years to come. However, even without such anticipated increase in the price resulting from a growing demand, the twenty year net income to Kunz would total approximately $2,220,000.00.

7. Based on Kunz's reliance on the U.S. Interior Department's designation of the subject parcels of real property as Shivwits Band Trust property, Kunz has invested approximately $200,000.00 for development costs and prepaid rent for the five signs.

8. The St. George City stop work order imposed on this project, is interfering with the advertising contracts described herein, under which assurances have been made to advertisers that the sign structures would be completed for the installation of advertising during the week of November 6th through November 10, 1995.

for the installation of advertising during the week of November 6th through November 10, 1995.

Dated this 15th day of November, 1995.

/s/ Paul D. Held
PAUL D. HELD

ACKNOWLEDGMENT

State of California |
|
County of San Bernardino |

On November 15, 1995, before me, Mary M. Torpey, Notary Public, personally appeared PAUL D. HELD, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Mary M. Torpey, Notary Public
Mary M. Torpey, Notary Public

MARY M. TORPEY
COMM. # 1067110
[SEAL] Notary Public – California
SAN BERNARDINO COUNTY
My Comm. Expires APR 23, 1999

APPENDIX G

D. Williams Ronnow (#4132)
Randall N. Skanchy (#2968)
John J. Walton (#6678)
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Boulder, CO 80302
Telephone: 303-443-1683

**IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH,
CENTRAL DIVISION**

SHIVWITS BAND OF PAIUTE INDIANS; and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING, a California Corporation; Plaintiffs, vs. STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation, Defendants.	**AFFIDAVIT OF KEN ESPLIN** Case No. 2:95CV 1025S Judge David Sam

STATE OF UTAH, UTAH DEPARTMENT OF TRANSPORTATION, a Department of Utah State Government, and ST. GEORGE CITY,	)
Counter-Claimants,	)
vs.	)
SHIVWITS BAND OF PAIUTE INDIANS, KUNZ & COMPANY, d/b/a/ KUNZ OUTDOOR ADVERTISING a California Corporation,	)
Counter-Defendants.	)
STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation,	)
Third-Party Plaintiffs,	)
vs.	)
BRUCE BABBIT, in his capacity as Secretary of the United States Department of the Interior, ADA DEER, in her capacity as Assistant Secretary of the Interior Indian Affairs, WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs, and the BUREAU OF INDIAN AFFAIRS,	)
Third Party Defendants.	)

STATE OF UTAH)
)
COUNTY OF WASHINGTON)

I, Kenneth Esplin, being first duly sworn, depose and say:

1. I am the Realty Officer for the U.S. Department of the Interior, Bureau of Indian Affairs. Southern Paiute Field Station, St. George, Utah.

2. My responsibilities include review of all land transactions, leases and other land-related activities that effect lands owned by the Indian tribes and bands within the region served by the Southern Paiute Field Station. This includes the lands of the five Indian bands of the Paiute Tribe of Utah (Shivwits, Kanosh, Koosharem, Cedar City, Indian Peaks Bands).

3. The land in question is two separate parcels of land in Section 13, Township 43 South, Range 16 West, Salt Lake Base and Meridian.

On July 16, 1993, Mr. Tom Flanigan from Kunz Outdoor Advertising Called Southern Paiute Field Station and asked if I would contact Merrill Wall and see if a meeting could be set up between Merrill and Tom to discuss a possible business venture with the Shivwits Band. I informed Mr. Flanigan that I would try to set up a meeting.

4. On July 30, 1993, Merrill Wall, Band Chairman for the Shivwits Band of Paiute Indians called and said that a meeting could be held on August 9, 1993 if this could be accommodated by Kunz Outdoor Advertising. A telephone call was placed to Mr. Tom Flanigan and the meeting was set up.

5. On August 9, 1993 a meeting was held between Merrill Wall, Shivwits Band Chairman and Tom Flanigan representing Kunz Outdoor. The meeting took place at 4:00 p.m. in the Southern Paiute Field Station Office in St. George. A proposal was made by Mr. Flanigan that Kunz Outdoor (Kunz & Company) would be willing to provide the money "up-front" for the Shivwits Band of Paiute Indians to purchase land in the South Periphery of the City of St. George or immediately south of the Utah State Line along the Interstate Highway 15 corridor leading into St. George. This money would be provided and property, if it could be found, would be purchased by the Shivwits Band of Paiute Indians.

6. The Shivwits Band in consideration for the up-front money would grant Kunz & Company the exclusive right to place outdoor advertising signs on the property. Mr. Wall, Shivwits Band Chairman, was personally in favor of the proposal as it would give the Shivwits Band an opportunity for economic development. However, Chairman Wall stated that such a proposal and transaction would need to be approved by the Shivwits Band Council. Part of the agreement proposed was that the lease fee to the Shivwits Band would be considered prepaid until the up-front money provided by Kunz & Company was amortized out.

7. A second meeting was held with the Shivwits Band Council and Tom Flanigan representing Kunz & Company on October 27, 1993. At this meeting the Shivwits Band Council approved pursuing the acquisition of the land. A search for suitable property was started soon after the October 27, 1993 meeting.

8. On November 9, 1993, a third meeting with Merrill Wall, Shivwits Band Chairman and Tom Flanigan of Kunz & Company was held in the Southern Paiute Field Station Office in St. George, Utah. At this time a possible parcel of land was discussed. The decision was made to pursue the purchase of property owned by the Sturzenneger family. A real estate agent was engaged to try to put together a purchase of the property.

9. Negotiations were started with C.R. and Dartha Sturzenneger in January of 1994 and culminated in an offer and acceptance on May 21, 1994. On or about July 7, 1994 I, Ken Esplin, telephone[d] the office of Mr. Gary Esplin, St. George City Manager, to see if the City Manager was in and if I could come across the street and visit with him. The Secretary in Mr. Esplin's office said to come on over. I walked across the street and was able to meet with Gary. I explained that the Shivwits Band was in the process of purchasing land in the South periphery of St. George along Interstate Highway 15 and asked him as City Manager if the City of St. George would provide a letter of support for this endeavor to the Shivwits Band of Paiute Indians. I was informed that he would need to discuss this with the City Council and would get back to me. After a couple of weeks I called Mr. Esplin, the St. George City Manager, and was told that he had not yet presented the request to the St. George City Council. Several weeks later I contacted Mr. Gary Esplin and asked again about the letter. At this time I was informed by Mr. Esplin that the City of St. George could not supply such a letter because they were afraid the land would be used for the purpose of erecting outdoor advertising signs and the City was opposed to outdoor advertising signs.

10. A letter notifying St. George City of this acquisition was mailed to the City of St. George on August 1, 1994, from the B.I.A. office in St. George. (Exhibit "A" attached hereto).

11. The Sale/Purchase transaction was completed on August 9, 1994 and the property was deeded to the Shivwits Band of Paiute Indians. The Shivwits Band immediately deeded the property to the United States of America in Trust for the Shivwits Band of Paiute Indians and made application for the land to be taken into trust.

12. The trust application was finally completed and the land was officially taken into trust on August 31, 1995.

13. Separate leases for the five sign sites were approved by the Secretary of the Interior of September 11, 1995. These leases are between the Shivwits Band of Paiute Indians as Lessor and Kunz & Company as Lessee.

/s/ Ken Esplin Dated: 12/4/95
Ken Esplin

COUNTY OF WASHINGTON)
) **ss.**
STATE OF UTAH)

The above named affiant Ken Esplin personally appeared before me, and first being duly sworn, did acknowledge the statements above and subscribed his name thereto.

WITNESS my hand and official seal.

My commission expires: 2/15/99.

[SEAL]

/s/ Tammie L. Taucer
Notary Public

NOTARY PUBLIC
TAMMIE L. TAUCER
624 North 1100 West
[SEAL] St. George, Utah 84770
My Commission Expires
February 15, 1999
STATE OF UTAH

APPENDIX H

PAUL M. WARNER,
United States Attorney (USB #3389)
STEPHEN ROTH,
Assistant United States Attorney (#2808)
185 South State Street, #400
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
Facsimile: (801) 524-6926
Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, Central DIVISION

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & COMPANY, dba KUNZ OUTDOOR ADVERTISING, a California Corporation,

Plaintiffs and Counterclaim Defendants,

vs.

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; and ST. GEORGE CITY, a Utah Municipal Corporation,

Defendants and Counterclaim and Third-Party Plaintiffs.

vs.

BRUCE BABBIT, in his capacity as Secretary of the United States Department of the Interior; ADA DEER, in her capacity as Assistant Secretary of the Interior

Civil No. 2:95CV 1025C

DECLARATION OF WAYNE NORDWALL

Indian Affairs; WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Third-Party Defendants.

Attached hereto is the declaration of Wayne Nordwall, Director of the Western Regional Office of the Bureau of Indian Affairs, Department of the Interior.

DATED this 12th day of June, 2000.

PAUL M. WARNER
United States Attorney

/s/ Stephen Roth
Stephen Roth
Assistant United States Attorney

DECLARATION

Pursuant to the provision of 28 U.S.C § 1746, the undersigned declares as follows:

1. I am employed as the Regional Director of the United States Bureau of Indian Affairs' Western Regional Office, 400 N. 5th Street, Phoenix, Arizona.

2. When the Shivwits Band's application and supporting documents for the trust acquisition of the two I-15 parcels were presented to this office by our Southern Paiute Field Office, Regional Office staff evaluated them and concluded that they were in compliance with applicable laws and regulations.

3. My office considers the door officially closed on acquisitions made under the Paiute Restoration Act (P. L. 96-227; 25 U.S.C. § 766) since Congress said in a subsequent 1984 Act that "[t]he transfer of the approximately four thousand seven hundred and seventy acres of land .... shall be in complete fulfillment of the provisions of Public Law 96-227 relating to the enlargement of the tribe's reservation." Since then, we have not used the Restoration Act as authority for any trust acquisitions. The Indian Reorganization Act, 25 U.S.C. § 465, and its regulations (Part 151) were the authority for this trust acquisition and for all others we have considered for the Paiute Tribe of Utah and its bands since 1984.

4. My office ensured that the Shivwits Band's application addressed the checklist in Part 151.10. In balancing the factors set forth at § 151.10(a)-(c), (e) and (h), we assumed that since no response was received from the City of St. George, Utah, to our Southern Paiute Field Office's letter of August 1, 1994, on the proposed trust acquisitions of the two parcels, that there would be no adverse impact on the local government. The Band, in order to be self-sufficient, had an enormous need to engage in some sort of economic development. We concluded this need would be served by this trust acquisition. We also concluded that the benefit to the Band outweighed the minor loss of tax dollars to the City of St. George. Although we did not include an analysis of part (f) of § 151.10 in our evaluation, I declare it was not deliberate but an oversight on our part.

5. The Department of the Interior has identified trust acquisitions as categorically excluded actions where there will be no immediate change in use of the land. These exclusions are listed in 516 DM 2, Appendix 1, and

516 DM 6, Appendix 4.4. Thus, a Categorical Exclusion Checklist was executed covering the two parcels. Since the two parcels were being acquired for economic development, this office amended the Checklist to make it clear that environmental documentation (an EA or EIS) would be necessary at the time of leasing. This is a normal procedure of the Bureau of Indian Affairs when a change in use for the land is known, but the change will not occur until some time after the land will be taken into trust.

6. The Southern Paiute Field Office did not provide notice to the State because the regulations require that the notice be provided to the state or local government. In this case the local government was the City of St. George.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of June, 2000.

By: /s/ Wayne Nordwall
Regional Director
Western Regional Office
Bureau of Indian Affairs

(5)

FILED
MAY
FEB 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1160

In the Supreme Court of the United States

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah Municipal corporation, PETITIONERS

v.

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING; GAYLE NORTON, in her capacity as Secretary of the United States Department of the Inter
McCALEB, in his capacity as Assistant S
Interior Indian Affairs; WAYNE NORI
capacity as Area Director of the Bureau
and the BUREAU OF INDIAN A

ON PETITION FOR A WRIT OF CER
TO THE UNITED STATES COURT O
FOR THE TENTH CIRCUI

BRIEF FOR RESPONDE
SHIVWITS BAND OF PAIUTE
IN OPPOSITION

JOHN FREDI
FREDERICK
& HESTER, I
1900 Plaza Dri
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

A.L.A. SCHECHTER POULTRY CORP. v. UNITED STATES, 295 U.S. 495 (1935) 13

AM. POWER & LIGHT CO. v. SECURITIES & EXCH. COMM'N, 329 U.S. 90, 104 (1946) 18

BLOCK v. NORTH DAKOTA, 461 U.S. 273 (1983) 17, 18

CITIZENS EXPOSING TRUTH ABOUT CASINOS v. NORTON, NO. 02-1754, 2004 14

CITY OF LINCOLN CITY v. UNITED STATES DEP'T OF INTERIOR, 229 F. SUPP. 2D 1109, 1128 (D. OR. 2001) 15

CONFEDERATED TRIBES OF SILETZ INDIANS v. UNITED STATES, 110 F.3D 688, 698 (9TH CIR. 1997), CERT. DENIED, 522 U.S. 1027 (1997) 8

DEP'T OF THE INTERIOR v. SOUTH DAKOTA, 519 U.S. 919, 919-20 (1996) 12

J.W. HAMPTON, JR. & CO. v. UNITED STATES, 276 U.S. 394, 409 (1928) 8

LAYNE & BOWLER CORP. v. WESTERN WELL WORKS, INC., 261 U.S. 387, 393 (1923) 7

MISTRETTA v. UNITED STATES, 488 U.S. 361, 372 (1989) 13

PANAMA REFINING CO. v. RYAN, 293 U.S. 388 (1935) 13

RUST v. SULLIVAN, 500 U.S. 173, 190-91 (1991) 15

SHIVWITS BAND OF PAIUTE INDIANS V. UTAH, 428 F.3D 966 (10TH CIR. 2005) 9

SOUTH DAKOTA I, 69 F.3D 878 13

SOUTH DAKOTA V. UNITED STATES DEP'T OF THE INTERIOR, 423 F.3D 790 (8TH CIR. 2005) 12, 13, 15

TOMAC V. NORTON, 433 F.3D 852 (D.C. CIR. 2006) 14

UNITED STATES V. ROBERTS, 185 F.3D 1125, 1137 (10TH CIR. 1999) 9, 10, 11, 12

WHITMAN V. AM. TRUCKING ASS'NS INC., 531 U.S. 457, 472 (2001) ..... *passim*

STATUTES

25 U.S.C. § 415 ..... 2, 3

25 U.S.C. § 465 ..... 13, 17

25 U.S.C. §§ 2, 9, 13 1

25 U.S.C. §§ 1300l-1, 1300l-2(a) 14

25 U.S.C. § 2719 9

25 U.S.C. §§ 461 1

28 U.S.C. §2409(a) 6, 17

RULES

Supreme Court Rule 10 5

REGULATIONS

25 C.F.R. § 151.1-.14 (1994) 4

25 C.F.R. § 151.10 (1994) 16

25 C.F.R. § 151.11 (2006) 8

25 C.F.R. § 151.11(a) (2006) 16

25 C.F.R. § 151.11(d) (2006) 16

25 C.F.R. § 151.12 (2006) 7, 9

25 C.F.R. § 151.12(b) 12

25 C.F.R. §§ 151.10-.11 (2006) 4

60 Fed. Reg. 32879, 32875-32878 (June 23, 1995) 6

60 Fed. Reg. 48894 (Sept. 21, 1995) 6

61 Fed. Reg. 18082 (April 24, 1996) 7

62 Fed. Reg. 1057 (Jan. 8, 1997) 6

Respondent, Shivwits Band of Paiute Indians ("the Tribe"), submits this Brief in Opposition to the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. The Tribe submits that the Court should deny the Petition because there is no compelling reason to review the lower court's ruling that Section 465 is constitutional.

STATEMENT

Petitioners ask the Court to review whether Section 465 is an unconstitutional delegation of Congress' authority to regulate commerce with Indian Tribes. Congress has historically given the Executive Branch broad authority over the management of Indian affairs. *E.g.*, 25 U.S.C. §§ 2, 9, 13. Section 465 is part of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461, *et seq.*, an Act which was designed to bring an end to an allotment policy that resulted in the loss of millions of acres of Indian land. Section 465 was designed to give the Secretary of the Interior the authority to restore to Indian ownership some of what was lost.

The court of appeals held that the Secretary of the Interior had the constitutional authority to acquire the parcels at issue in trust for the Tribe pursuant to Section 465. Appendix of Petition for Writ of Certiorari (hereinafter "Pet. App.") 9-14. After the property was taken in trust, the Tribe sought and obtained the Secretary's approval of the Tribe's lease to Kunz and

Co.[1] for the purpose of constructing billboards on the trust parcels pursuant to 25 U.S.C. § 415.[2] Pet. App. 48, 60. The court of appeals also held that Petitioners had no jurisdiction to regulate these federally sanctioned activities. Pet. App. 28-33. Petitioners do not seek review of the court of appeals' holding on this latter issue. Rather, Petitioners only seek review of the court's holding that Section 465 is constitutional.

In 1993, Kunz proposed that the Tribe purchase the parcels and offered to finance the purchase in return for a lease back to Kunz. Pet. App. 3, 95. The Tribe saw the proposal as an economic development opportunity, a way to "increase its meager revenue stream." Pet. App. 3. Thereafter, on July 7, 1994, an official of the Bureau of Indian Affairs (BIA) contacted the City Manager of the City of St. George and orally advised him that the Tribe intended to purchase two parcels of land and asked if the City "would provide a letter of support for this endeavor." Pet. App. 4; Appellants' App. at 128A, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274). The City declined to provide such a letter because the City "was

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[1] Plaintiff Kunz and Co., d/b/a Kunz Outdoor Advertising (Kunz), is a California corporation engaged in the business of leasing outdoor advertising space on billboards. It owns and/or leases ground space, erects and maintains billboards thereon, and leases space on the face of the billboards to businesses and entities engaging in outdoor advertising.

[2] The full text of 25 U.S.C. § 415 (1994) appears in the Appendix to this Response (hereinafter "Resp. App."), at Appendix A. The version of 25 U.S.C. § 415 that appears in Appendix A is that which was in effect at the time the parcels of land at issue here were taken into trust.

afraid the land would be used for the purpose of erecting outdoor advertising signs and the City was opposed to [such] signs." *Id.* On August 1, 1994, the BIA sent a letter to the City again stating that the Tribe was "in the process of purchasing two small parcels of land located in an undeveloped area of" the City. *Id.*; Fed. Aplee. Supp. App. at 1, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274).[3] The letter identified the two parcels in detail by location and tax identification numbers. Pet. App. 4. The letter again sought City support of the Tribe's endeavor. *Id.* The City did not respond to the BIA's letter. *Id.*; Appellants' App. at 131, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274).

On August 9, 1994, the Tribe purchased the parcels from the respective private owners. Pet. App. 5. The next day, on August 10, 1994, the Tribe tendered a special warranty deed to the BIA, along with an application and supporting documents to the BIA requesting that the off-reservation trust acquisition be formally approved by that agency. *Id.* Over one year later, on August 31, 1995, the BIA approved the Tribe's request for approval of the trust acquisition and formally accepted the properties into trust. *Id.*

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[3] The two parcels in question are located approximately 19 miles from the Tribe's Reservation. *Shivwits Band Fee-to-Trust Land Transfer and Outdoor Advertising Leases Final Environmental Assessment* B-W PN 808, 1-3 (March 2003); Appellant's App. at 185, *Shivwits Band of Paiute Indians v. Utah* (10th Cir. Case No. 03-4274. The Reservation is located approximately 12 miles northwest of the City of St. George, Utah. *Id.*

The Tribe's lease of the two trust parcels to Kunz was approved by the Secretary on September 11, 1995. Pet. App. 97. By letter dated October 25, 1995, shortly after Kunz began construction of five advertising billboards on the Tribe's Trust property, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened Kunz with criminal prosecution if it did not cease construction of the signs immediately. Pet. App. 6. The Tribe and Kunz then sought and obtained a preliminary injunction in the district court. Pet. App. 7, n3.

In Petitioners' statement of the case, they assert that, "[t]he State of Utah and the City of St. George became aware of Kunz's plan [to lease the Tribe's trust properties for the purpose of outdoor advertising] once construction of the billboards began." Pet. 4. However, this directly contradicts the record. As shown above, the City was clearly on notice of the proposed trust acquisition and the contemplated use of the property over a year before the BIA actually accepted the deed and took the land in trust. Pet. App. 4, 96-97.[4] Moreover, the record reflects that the City of St. George at least suspected that billboards might be constructed on the land for over a year before actual construction began. Pet. App. 4. Yet, for reasons unknown, the City of St. George chose to wait until

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[4] The regulations in effect at the time did not require the BIA to notify either the State or the City that the BIA intended to take land in trust. Pet. App. 19; 25 C.F.R. § 151.1-.14 (1994). Resp. App. E. The BIA nevertheless gave the City of St. George notice of the proposed transaction over one year before the land was actually taken in trust. The regulations now require that the State and local governments be notified of any proposed trust acquisition. 25 C.F.R. §§ 151.10-.11 (2006). Resp. App. B, C.

after the trust acquisition was complete, the leases were approved, and the signs were in construction before taking any action. The City of St. George neither objected to the process nor sought the State's assistance prior to the United States' formal acquisition in trust in August 1995.

SUMMARY OF THE ARGUMENT

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." This case does not present compelling reasons for review. Petitioner's resistance to the taking of land into trust is to be expected in light of the fact that state and local governments are largely preempted from exercising regulatory authority over federally authorized activities in "Indian Country." The resulting "intergovernmental frictions," Pet. 3, are a natural consequence of overlapping sovereignty. The mere fact that there may be a lot at stake for state and local governments because Congress has granted the Executive broad authority to take land into trust for Indians does not make Section 465 an *unconstitutional* delegation of power.

Petitioners contend that Congress has unconstitutionally delegated to the Executive branch "unrestricted power to take lands – any lands – into trust 'for Indians.'" Pet. 3. This alarmist reading of Section 465 has been rejected by all of the courts that have considered the issue. Moreover, even assuming *arguendo* that Section 465 were found to be unconstitutional, the Court is without the power to

afford meaningful relief to Petitioners in this case because the Indian Lands exception to the Quiet Title Act, 28 U.S.C. §2409(a) (QTA), bars Petitioners' claims because they seek to invalidate the United States' trust title to the lands at issue. Nor would review be meaningful in this case because the regulations in effect at the time the Tribe's land was taken in trust have since been superseded.[5] Finally, this case is simply not appropriate for Supreme Court review because the Tenth Circuit's holding is not inconsistent with any decision of this Court, nor does this case implicate compelling principles that would have a widespread and general impact on the public as a whole.

ARGUMENT

I. THIS CASE PRESENTS NO FUNDAMENTAL CONSTITUTIONAL OR STATUTORY QUESTION THE SETTLEMENT OF WHICH IS LIKELY TO HAVE WIDESPREAD AND GENERAL IMPACT

The Court has stated that:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of

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[5] 60 Fed. Reg. 32879, 32875-32878 (June 23, 1995), *as corrected at* 60 Fed. Reg. 48894 (Sept. 21, 1995), *as corrected at* 62 Fed. Reg. 1057 (Jan. 8, 1997) (codified at 25 C.F.R. § 115.11 (2006)). Resp. App. C.

opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) (per Taft, C.J.). The present case does not pose such a question because every court to consider the issue has correctly found that Section 465 is constitutional, and is not a "standardless grant of complete discretion," as Petitioners claim. Pet. i. Moreover, the unique facts of this case make review inappropriate because in the time period since the particular properties in dispute were taken into trust for the Tribe, the Secretary of the Interior has issued new regulations affecting trust land acquisitions. The new regulations provide for judicial review of the Secretary's decision to acquire the land before it is actually taken in trust, thus removing any previous concern over the lack of judicial review of the manner in which the Executive Branch exercises its delegated authority.[6] Consequently, this is an isolated case in which the procedures for taking land into trust were governed by regulations that no longer apply. Finally, since title to the properties has already vested in the United States government, Petitioners no longer have the means to challenge the taking of land into trust. If the Supreme Court wishes to review a challenge to Section 465, it would be more appropriate to do so in a case that challenges the taking of land into trust *before*

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[6] *See* 61 Fed. Reg. 18082 (April 24, 1996) (establishing a 30-day waiting period after final administrative decisions by the Secretary to acquire land into trust under the IRA and other federal statutes so that interested parties will have sufficient notice before land is actually transferred to seek judicial or other review under the Administrative Procedure Act and applicable regulations.) (codified, as amended, at 25 C.F.R. § 151.12 (2006)). Resp. App. D.

title has vested, and which follows the acquisition procedures identified under the current federal regulations, as codified at 25 C.F.R. § 151.11 (2006).[7]

A. There is no conflict of authority between the circuit courts of appeal on whether Section 465 is an unconstitutional delegation of power; all of the courts to consider the matter are in accord that § 465 is not an unconstitutional delegation.

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. *Whitman v. Am. Trucking Ass'ns Inc.*, 531 U.S. 457, 472 (2001). The Court has consistently held that when Congress confers decisionmaking authority on agencies *Congress* must "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform." *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (second emphasis added). The Tenth, Eighth, and First Circuits have all directly considered the issue of whether Section 465 is an unconstitutional delegation of power. All have found that it is not, and that the statute does in fact lay down an intelligible principle to guide the Secretary's discretion. Likewise, the Ninth Circuit has opined that Section 465 is a constitutional delegation. *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 698 (9th Cir. 1997), *cert. denied*, 522 U.S. 1027 (1997) (stating that "the general delegation of power to the Executive to take land into trust for the Indians is a valid delegation because

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[7] The full text of 25 C.F.R. § 151.11 (2006) appears in Resp. App. C.

Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used").[8] In fact, there is no contrary authority in any of the circuit courts of appeals. Not only is there no conflict among the circuit courts of appeals, *no* court has found Section 465 to be unconstitutional since the Secretary of the Interior revised the regulations to provide for judicial review of final agency action in 1996.[9] Because all of the circuit courts are in accord, this case does not warrant consideration by this Court.

The Tenth Circuit has twice specifically held that Section 465 does not violate the non-delegation doctrine, both in the case below, *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), and in *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). In *Roberts*, the Tenth Circuit Court of Appeals agreed with the district court's finding that Section 465 is a proper delegation of authority. 185 F.3d at 1137. The court concluded that the statute

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[8] In *Siletz*, the court was specifically considering the constitutionality of a provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719, which required the state governor's concurrence before land could be taken into trust by the Secretary of the Interior on behalf of Indian tribes for gaming. In upholding the constitutionality of § 2719, the Ninth Circuit Court of Appeals discussed the broader power of the Secretary of the Interior to take land into trust for Indians under 25 U.S.C. § 465 and found that the general delegation of power to the Executive to take land into trust for Indians is a valid delegation because Congress has given specific guidelines to limit Executive discretion.

[9] *See* Resp. App. D for the current regulations, 25 C.F.R. § 151.12 (2006).

itself provides standards for the Secretary's exercise of discretion. *Id.* Specifically, the statute provides that any land must be acquired for Indians, and funds appropriated for the acquisitions may not be used to provide land for Navajos outside their reservation boundaries. *Id.* (citations omitted). In addition, the court noted that the legislative history identifies goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by .... oppression and paternalism" of the prior allotment policy. *Id.* (citations omitted).[10]

The Tenth Circuit also held that Section 465 is constitutional in the case below. Pet. App. 10-13. The Tenth Circuit reaffirmed its previous holding from *Roberts*, 185 F.3d at 1137, finding that "the statute itself provides standards" for the Secretary's exercise of discretion and that the statute is therefore not an unconstitutional delegation. Pet. App. 11-12. The court

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[10] Prior to 1887, title to most Indian land was held by the tribe and not its citizens. The General Allotment Act (GAA) of 1887 was a comprehensive congressional attempt to "civilize" Indians and assimilate them into mainstream American society by breaking up the tribal land base and parceling out plots, or "allotments," to individual Indians who were to be converted into yeoman farmers. David H. Getches et al., *Federal Indian Law* 141 (4th ed. 1998). While the goal of terminating tribalism and civilizing Indians may have seemed to Congress at the time to be a noble goal, the darker side of this policy was that millions of acres of surplus tribal lands were opened up for settlement by non-Indian homesteaders. The resulting loss of land was devastating for tribes. *See* note 17, *infra.* The Indian Reorganization Act of 1934 was intended to bring an end to the failed allotment policies and the concomitant loss of Indian lands and to facilitate tribes' acquisition of additional acreage and repurchase of former tribal domains. Felix Cohen, *Handbook of Federal Indian Law* 86 (2005 ed.).

noted that the legislative history identifies Congress' underlying goals in passing Section 465, providing further guidance to the Secretary in the exercise of his or her discretion. *Id.*

Petitioners assert that the Tenth Circuit's opinion "ignores the nationwide scope and impact of the power [Section 465] confers on local BIA bureaucrats." Pet. 21. To show this "impact," Petitioners cite to a statistic from 1999, in which the Department of the Interior estimated that it *receives* 7,000 trust and acquisition applications annually. *Id.* (citations omitted) (emphasis added). However, Petitioners fail to cite the number of these applications that were approved or disapproved. More specifically, Petitioners do not mention the number, if any, of these applications approved over the objections of state or local government. This statistic is simply not relevant to the question of whether Section 465 is constitutional.

Moreover, the Tenth Circuit is clearly not alone in finding that Section 465 does not grant local BIA bureaucrats "unbounded authority ... to stockpile lands 'for Indians,'" as suggested by Petitioners. Pet. 21. Three other circuits have found that Section 465 is a constitutional delegation of power.

In *Carcieri v. Norton*, the First Circuit rejected the argument that Congress had failed to articulate sufficient standards to guide the Secretary's trust determinations. 398 F.3d 22, 26 (1st Cir. 2005). Instead, the court found that the requirement in Section 465 that the acquisition be "for the purpose of providing land for Indians" was an "intelligible principle" to sufficiently guide the Secretary's

discretion. *Id.* at 26-30. The court thus agreed with the conclusion of the district court and found, for the same reasons articulated in *Roberts*, 185 F.3d 1125, that Section 465 is not an unconstitutional delegation of legislative power. *Id.* at 30.

Next, in *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790 (8th Cir. 2005) (*South Dakota II*), the Eighth Circuit Court of Appeals upheld the district court's finding that Section 465 was constitutional after reviewing the question *de novo*. The issue was before the court for the second time, following years of litigation and a remand from this Court.[11] The court of appeals rejected the State's arguments that Section 465 does not provide sufficient boundaries governing the Secretary's decision to acquire land in trust for Indians and fails to provide an "intelligible principle." *South Dakota II*, 423 F.3d at 795. Instead, the court found that the Supreme Court

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[11] In the first case, *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 881-85 (8th Cir. 1995), *vacated by* 519 U.S. 919 (1996), a panel of the Eighth Circuit, in a 2-1 decision, concluded that Section 465 violated the non-delegation doctrine. The court reasoned that the Department of the Interior had interpreted its own power too broadly by treating the statute as delegating unreviewable discretionary authority to the Secretary. *Id.* In response to *South Dakota I*, the Department of the Interior promulgated a new regulation that provided for judicial review, 25 C.F.R. § 151.12(b), and then petitioned for writ of certiorari, asking that the United States Supreme Court vacate *South Dakota I* and remand the case to the Department of the Interior. *Id.* The Supreme Court granted the writ and vacated the judgment, directing that the matter be remanded "to the Secretary of the Interior for reconsideration of his administrative decision," in light of the new regulation allowing for judicial review. *Dep't of the Interior v. South Dakota*, 519 U.S. 919, 919-20 (1996).

has given Congress wide latitude in meeting the intelligible principle requirement and recognized that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). The court found that it was not bound by its earlier conclusion in *South Dakota I*, 69 F.3d 878, because the Supreme Court vacated that decision. *South Dakota II*, 423 F.3d at 796. The court then reexamined the broader context of the IRA and determined that 25 U.S.C. § 465 does in fact provide guidance sufficient to withstand a constitutional challenge based on non-delegation grounds. *Id.*

As the court noted in *South Dakota II*, the Supreme Court has struck down statutes on delegation grounds on only *two* occasions, and not since 1935. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Moreover, the statutes at issue in those cases arose under unique circumstances and delegated to the President exceptionally broad control over the national economy. *South Dakota II*, 423 F.3d at 795. Since 1935, the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.*, quoting *Whitman*, 531 U.S. at 474-75. The court in *South Dakota II* concluded that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust." 423 F.3d at 797. Section 465 was therefore held not to be an unconstitutional delegation of power.

Most recently, in *Tomac v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), the Court of Appeals for the D.C. Circuit found that Congress' delegation to the Secretary of the authority to acquire real property in trust for the benefit of the Pokagon Band of Potawatomi Indians under Section 6 of the Indian Restoration Act, Section 1300j-5, was not an unlawful delegation of power. Section 6 of the Indian Restoration Act is similar to Section 465 in that it allows the Secretary to acquire real property for the Tribe and hold such land in trust for the benefit of the Tribe. Section 1300j-5. The court in *Tomac* found that when this section is read in light of its clear purpose, the history of the Tribe, and the Restoration Act as a whole, it is clear that Congress set forth appropriate boundaries to guide the Secretary in trust land acquisitions. 433 F.3d at 866. This case, albeit dealing with a different statute specific to the taking of lands in trust for the Pokagon Band, lends further support that Section 465 is not an unlawful delegation of power.

Moreover, federal district courts that have considered the constitutionality of Section 465 and similar statutes allowing for trust land acquisitions have consistently found the delegation of authority to be constitutional. *See Citizens Exposing Truth About Casinos v. Norton*, No. 02-1754, 2004 U.S. Dist. LEXIS 27498, (D.D.C. Apr. 23, 2004); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 154-56 (D.D.C. 2002), *aff'd* 348 F.3d 1020 (D.C. Cir. 2003) (the Auburn Indian Restoration Act, 25 U.S.C. §§ 1300*l*-1, 1300*l*-2(a), allowing for the taking of land into trust for the United Auburn Indian Community, does not constitute an unconstitutional delegation of Congressional authority);

City of Lincoln City v. United States Dep't of Interior, 229 F. Supp. 2d 1109, 1128 (D. Or. 2001).

In fact, the only case to hold Section 465 unconstitutional under the delegation doctrine, *South Dakota I*, was vacated and remanded by this Court, and therefore has no precedential value. *See* Note 15, *supra*. The law of the case in *South Dakota* after remand is that Section 465 is indeed constitutional. *South Dakota II*, 423 F.3d at 797-799.

In addition to the ample authority establishing that Section 465 is constitutional, this Court has stated that courts must accord acts of Congress the presumption of constitutionality. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). Therefore, absent some basis for finding otherwise, which Petitioners have not articulated, Section 465 should be presumed to be a constitutional delegation of legislative power. In sum, this case simply does not pose a significant constitutional question such that Supreme Court review would be appropriate.

B. This case is not appropriate for review because it is an isolated case that will not have importance to the public as a whole.

Petitioners claim that Section 465 can be easily "exploited to avoid legitimate state laws and land use or development restrictions." Pet. 21. This is not the case under the current regulations, which require that, where there is an off-reservation acquisition of land, as the distance between the tribe's reservation and the land to be acquired increases, "the Secretary shall give greater scrutiny to the tribe's justification of

anticipated benefits from the acquisition." 25 C.F.R. § 151.11(a) (2006). Resp. App. C. In cases where the land to be acquired is far from the tribe's reservation, the Secretary must also give greater weight to the concerns raised by state and local governments with respect to the "acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d) (2006). Resp. App. C. Under the regulations in effect at the time the properties here were taken in trust, the Secretary was not required to make such an analysis, but rather was only required to consider "jurisdictional problems and potential conflicts of land use which may arise" as one factor in evaluating a request for acquisition. 25 C.F.R. § 151.10 (1994). Resp. App. E. As a result of the significant changes in the regulations, new trust applications now have more hurdles to clear to be accepted. It is a matter of public record that since 1995, when the lands at issue in this case were taken in trust, no other trust land applications submitted by the Paiute Tribe of Utah or any of its Bands have been approved, perhaps because of the additional opportunities for state and local governments to object.[12] This fact itself indicates that the State's concern that there will be a proliferation of Indian trust land acquisitions is unwarranted.

Respondents recognize that these new regulations clearly could not cure an unlawful delegation of power if the statute itself fails to provide an intelligible principle. *Whitman*, 531 U.S. at 472-73.

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[12] Joint Memorandum in Opposition to State Defendants' Motion for Summary Judgment at 20, *Shivwits Band of Paiute Indians v. Utah* (Civil No. 2:95CV 1025C).

However, as every court to consider the issue has found, 25 U.S.C. § 465, particularly when viewed within the broader context of the IRA, provides sufficient guidance to withstand a constitutional challenge on delegation grounds. The effect of the new regulations on the trust acquisition process merely adds further support for the position that this case does not present an important question warranting Supreme Court review.

C. The Court Should Deny Review Because the Court is Without Jurisdiction to Grant Meaningful Relief.

The State's claim that Section 465 is unconstitutional is aimed at seeking a reexamination of the federal decision to take land into trust. Because the United States has already acquired the Shivwits land in trust, any claims aimed at affecting title are barred by the Indian lands exception to the Quiet Title Act, 28 U.S.C. §2409(a). *Block v. North Dakota*, 461 U.S. 273 (1983).

It is well-settled that the QTA provides the exclusive means by which adverse claimants can challenge the United States' title to real property. *Id.* at 286. The Indian Lands Exception to the QTA clearly prohibits any action that would defeat title to Indian lands acquired in trust under Section 465. *Id.* at 277.

Petitioners have not appealed the Tenth Circuit's ruling that the Quiet Title Act precluded the court from reviewing and remedying any shortcomings in taking the land at issue into trust. Therefore, even if this Court wanted to review the issue whether Section

465 is unconstitutional, there would be no way to afford meaningful relief to Petitioners because title to the land would still be vested in the United States.

D. The court of appeals' decision is not inconsistent with this Court's decision in Whitman v. Am. Trucking Ass'n.

The Tenth Circuit rejected Petitioners' interpretation of *Whitman* in the opinion below, finding that Petitioners' assertion "that the 'intelligible principle' must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*." Pet. App. 13. The court further concluded that the *Whitman* Court reviewed and applied its past precedent concerning the non-delegation doctrine. *Id.* This precedent makes clear that broad phrases of purpose in an act are not "utterly without meaning" when viewed in the light of "the purpose of the Act, *its factual background* and *the statutory context* in which [the phrases of purpose] appear." *Am. Power & Light Co. v. Securities & Exch. Comm'n*, 329 U.S. 90, 104 (1946) (emphasis added). Thus, far from indicating that the intelligible principle must be found only on the face of the Act itself and not in the Act's legislative history, the cases indicate that it is important to determine if the delegation of authority is constitutional within the broader context of the Act and the factual background underlying its passage.

Moreover, *Whitman* itself made clear that the statute does not have to provide a "determinate criterion" for the exercise of the delegated power, as long as a policy is articulated. 531 U.S. at 475. Petitioners overlook this point when they state, "To be

sure, if Congress had enacted standards in Section [465] or elsewhere, they could be fleshed out by reference to [the factors identified in *Am. Power & Light Co.*]". Pet. 16. However, Congress does not have to enact "standards" so long as it articulates an "*intelligible principle*" for the exercise of the delegated power. *Whitman*, 531 U.S. at 475 (emphasis added). Congress has conveyed such a principle in Section 465, particularly when the statute is viewed in the context of the overall IRA.

The standard articulated in Section 465 directs the Secretary to exercise his or her authority "for the purpose of providing land for Indians." This is no broader than other phrases in which the Court has found an intelligible principle. For instance, in *Nat'l Broad. Co. v. United States*, the Court upheld as a valid delegation an act stating that an agency should promulgate regulations encouraging the use of radio in the "public interest, convenience, or necessity," noting that the meaning of "public interest" was limited in light of the larger aim of the Act. 319 U.S. 190, 215-217 (1943). Similarly, in *Whitman* the Court upheld a delegation to the Environmental Protection Agency to set ambient air quality standards "at the level that is requisite ... to protect the public health with an adequate margin of safety." 531 U.S. at 475-76. Petitioners note these standards, but attempt to distinguish them from setting land aside in trust on the grounds that in those cases greater specificity by Congress would be "insignificant or impossible." Pet. 14.

Petitioners assume without any supporting authority that the Secretary of the Interior's decisions

in setting aside lands in trust for Indians do not involve the same type of "complicated factors for judgment" that were contemplated in *Nat'l Broad. Co.*, 319 U.S. at 216. Pet. 14. However, Section 465 is part of the larger IRA, an Act intended to end the devastating policy of allotment which resulted in the loss of millions of acres of Indian land, and undertake new efforts to "encourage economic development, self-determination, cultural pluralism, and the revival of tribalism" for Indian tribes. Felix Cohen, *Handbook of Federal Indian Law* 86 (2005 ed.). Under the IRA, the Executive was to take an active role in enabling tribes to improve their economic status. *Id.* The IRA was also designed to bring an official end to the failed assimilation policies that had deprived Indians of their land and culture.[13] *Id.* at 78-87. Certainly against this backdrop, and in light of the unique trust obligations that the federal government owes to Indian tribes, the Secretary does indeed have to make complicated decisions about how to best assist Tribes in their economic development, such that a broad grant of authority from Congress is equally appropriate as it was with respect to the statutes at issue in cases like *Whitman* and *Nat'l Broad. Co.*

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[13] Of the approximately 156 million acres of Indian land in 1881, less than 78 million remained by 1900. *Cohen, supra*, at 78-79. By 1934, the year the IRA was passed, Indian land holdings had been reduced to 48 million acres. *Id.* Petitioners raise the concern that, "At the end of 1997, more than 56 million acres in 36 states were already held in trust by the Secretary." Pet. 21 (citations omitted). However, this hardly seems significant in light of the more than one hundred million acres of land lost by Indians during the Allotment Era.

Significantly, both the Tenth Circuit in the opinion below and the Eighth Circuit in *South Dakota II* relied upon *Whitman* to *support* their holdings that Section 465 is constitutional. Likewise, the First Circuit cited to *Whitman* in *Carcieri v. Norton*. 398 F.3d at 32-34. None of these cases read *Whitman* to support the notion that Section 465 is an unconstitutional, standardless delegation.

In sum, Section 465 does not grant the Secretary unbounded discretion, as Petitioners claim. Instead, when read in light of the purpose of the IRA to restore to Indians a portion of the lands lost during the failed Allotment Era, the Act's factual background, and the broader statutory context, it is clear that Section 465 provides an intelligible principle to guide the Secretary of the Interior in the exercise of his or her discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 12th day of May, 2006.

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APPENDIX A

25 U.S.C. § 415 (1994). Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, leases of land on the Aqua Caliente (Palm Springs) Reservation, the Dania Reservation, the Pueblo of Santa Ana (with the exception of the lands known as the "Santa Ana Pueblo Spanish Grant")[,] the Moapa Indian reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba

Indian Reservation, the Viejas Indian Reservation, the Tulalip Indian Reservation, the Navajo Reservation, the Mille Lacs Indian Reservation with respect to a lease between an entity established by the Mille Lacs Band of Chippewa Indians and the Minnesota Historical Society, leases the lands comprising the Moses Allotment Numbered 10, Chelan County, Washington, and lands held in trust for the Las Vegas Paiute Tribe of Indians, and lands held in trust for the Twenty-nine Palms Band of Luiseno Mission Indians, and lands held in trust for the Reno Sparks Indian Colony, [,] lands held in trust for the Cherokee Nation of Oklahoma, lands held in trust for the Pueblo of Santa Clara, lands held in trust for the Confederated Tribes of the Colville Reservation, lands held in trust for the Cahuilla Band of Indians of California, and the lands held in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and leases to the Devils Lake Sioux Tribe, or any organization of such tribe, of land on the Devils Lake Sioux Reservation, which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the

relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

(b) Any lease by the Tulalip Tribes under subsection (a) of this section, except a lease for the exploitation of any natural resource, shall not require the approval of the Secretary of the Interior (1) if the term of the lease does not exceed fifteen years, with no option to renew, (2) if the term of the lease does not exceed thirty years, with no option to renew, and the lease is executed pursuant to tribal regulations previously approved by the Secretary of the Interior, or (3) if the term does not exceed seventy-five years (including options to renew), and the lease is executed under tribal regulations approved by the Secretary under this clause (3).

APPENDIX B

25 C.F.R. § 151.10 (2006) On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by

or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW, Room 4525 MIB, Washington, DC 20240.)

APPENDIX C

25 C.F.R. § 151.11 (2006) Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in Section 151.10 (a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to 151.10 (e) and (f) shall be completed as follows: upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state

and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

APPENDIX D

25 C.F.R. § 151.12 (2006) Action on requests.

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to Part 2 of this title.

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

APPENDIX E

25 C.F.R. § 151.1 (1994) Purpose and scope.

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it members.

25 C.F.R. § 151.2 (1994) Definitions.

(a) "Secretary" means the Secretary of the Interior or his authorized representative acting under delegated authority.

(b) "Tribe" means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation

chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) "Individual Indian" means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, "Individual Indian" also means a person who meets the qualifications of paragraph (c) (1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) "Trust land" or "land in trust status" means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) "Restricted land" or "land in restricted status" means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance

instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, "Indian reservation" means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, "Indian reservation" means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) "Land" means real property or any interest therein.

(h) "Tribal consolidation area" means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

25 C.F.R. § 151.3 (1994) Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status (1) when the

property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status (1) when the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or, (2) when the land is already in trust or restricted status.

25 C.F.R. § 151.4 (1994) Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

25 C.F.R. § 151.5 (1994) Trust acquisitions in Oklahoma under Section 5 of the I.R.A.

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under Section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes

within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

25 C.F.R. § 151.6 (1994) Exchanges.

An individual Indian or tribe may acquire land in trust status by exchange if the acquisition comes within the terms of this part. The disposal aspects of an exchange are governed by Part 152 of this title.

25 C.F.R. § 151.7 (1994) Acquisition of fractional interests.

Acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if:

(a) The buyer already owns a fractional interest in the same parcel of land; or

(b) The interest being acquired by the buyer is in fee status; or

(c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or

(d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or

(e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

25 C.F.R. § 151.8 (1994) Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

25 C.F.R. § 151.9 (1994) Requests for approval of acquisitions.

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

25 C.F.R. § 151.10 (1994) Factors to be considered in evaluating requests.

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

25 C.F.R. § 151.11 (1994) Action on requests.

The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to Part 2 of this title.

25 C.F.R. § 151.12 (1994) Title examination.

If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.

25 C.F.R. § 151.13 (1994) Formalization of acceptance.

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

25 C.F.R. § 151.14 (1994) Information collection.

The information collection requirements contained in §§ 151.9 and 151.12 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 3et seq. and assigned clearance number 1076-0100. The collection of information is from Indian tribes or individuals who desire to acquire land in trust and who must identify the party(ies) involved and a description of the land involved. The information will be used by the Bureau to acquire the land in trust on behalf of the Indian tribes and individuals. Response is required to obtain a benefit.

(3)

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No. 05-1160

In the Supreme Court of the United States

STATE OF UTAH, ET AL., PETITIONERS

v.

SHIVWITS BAND OF PAIUTE INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the provision of the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, that authorizes the Secretary of the Interior to take real property into trust "for the purpose of providing land for Indians," 25 U.S.C. 465, is an unconstitutional delegation of legislative power.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 12
Conclusion 25

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 16
Alaska v. *Babbitt*, 75 F.3d 449 (9th Cir. 1995), cert. denied, 519 U.S. 818 (1996) 21
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 14, 16, 18
Block v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983) 21
Carcieri v. *Norton*, No. 03-2647, 2005 WL 2216322 (1st Cir. Sept. 13, 2005) 12
Cass County v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) 14
Central Mach. Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980) 20
City of Sherrill v. *Oneida Indian Nation*, 544 U.S. 197 (2005) 13, 23
Confederated Tribes of Siletz Indians v. *United States*, 110 F.3d 688 (9th Cir.), cert. denied, 522 U.S. 1027 (1997) 12

Cases—Continued: Page

County of Yakima v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) 2
Department of the Interior v. *South Dakota*, 519 U.S. 919 (1996) 13
Florida v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) 21
Hagen v. *Utah*, 510 U.S. 399 (1994) 17
Hodel v. *Irving*, 481 U.S. 704 (1987) 2
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 14
Lichter v. *United States*, 334 U.S. 742 (1948) 15, 16, 18, 19
Loving v. *United States*, 517 U.S. 748 (1996) 15
Mattz v. *Arnett*, 412 U.S. 481 (1973) 2
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973) 17, 18
Mistretta v. *United States*, 488 U.S. 361 (1989) 14, 15
Morton v. *Mancari*, 417 U.S. 535 (1974) 17, 18
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 15
Neighbors for Rational Dev., Inc. v. *Norton*, 379 F.3d 956 (10th Cir. 2004) 21
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) 11
O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 13
Panama Ref. Co. v. *Ryan*, 293 U.S. 388 (1935) 16
Rice v. *Olson*, 324 U.S. 786 (1945) 23

Cases—Continued: Page

Shawnee Trail Conservancy v. *United States Dep't of Agric.*, 222 F.3d 383 (7th Cir. 2000), cert. denied, 531 U.S. 1074 (2001) 21

Solem v. *Bartlett*, 465 U.S. 463 (1984) 2

South Dakota v. *United States Dep't of the Interior*:

69 F.3d 878 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996) 13

423 F.3d 790 (8th Cir. 2005), petition for cert. pending, No. 05-1428 (filed May 8, 2006) 12, 13, 16, 17

Touby v. *United States*, 500 U.S. 160 (1991) 14

United States v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) 20

United States v. *Hitchcock*, 205 U.S. 80 (1907) 20

United States v. *Jackson*, 280 U.S. 183 (1930) 20

United States v. *Mazurie*, 419 U.S. 544 (1975) 20

United States v. *Mitchell*, 463 U.S. 206 (1983) 20

United States v. *Mottaz*, 476 U.S. 834 (1986) 21

United States v. *Roberts*, 185 F.3d 1125 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000) 8, 10, 12

Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) 18

Whitman v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) 10, 14, 15, 16, 20

Yakus v. *United States*, 321 U.S. 414 (1944) 15

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 21
Clean Air Act, 42 U.S.C. 7409(b)(1) 15
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*:
16 U.S.C. 1536(a)(2) 24
16 U.S.C. 1536(a)(3) 24
Highway Beautification Act of 1965, 28 U.S.C. 131(h) ... 11
Indian General Allotment Act, ch. 119, 24 Stat. 388 ... 2, 17
Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* 13
Indian Reorganization Act, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*) ..... *passim*
§ 1, 25 U.S.C. 461 ..... 2, 17
§ 2, 25 U.S.C. 462 ..... 3, 17
§ 3(a), 25 U.S.C. 463(a) 3, 17
§ 4, 25 U.S.C. 464 ..... 3, 17
§ 5, 25 U.S.C. 465 ..... *passim*
§ 6, 25 U.S.C. 466 3
§ 7, 25 U.S.C. 467 3
§ 9, 25 U.S.C. 469 ..... 3, 17
§ 10, 25 U.S.C. 470 ..... 3, 17
§ 11, 25 U.S.C. 471 ..... 3, 17
§ 12, 25 U.S.C. 472 ..... 3, 17
§ 16, 25 U.S.C. 476 ..... 3, 17
§ 17, 25 U.S.C. 477 ..... 3, 17
§ 18, 25 U.S.C. 478 3
§ 19, 25 U.S.C. 479 16

Statutes and regulations—Continued: Page

Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, 102 Stat. 2938:
§ 101, 102 Stat. 2938 13
§ 102, 102 Stat. 2938 13
Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207 13
Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709 13
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 8, 9, 11, 21
Paiute Indian Tribe of Utah Restoration Act, 25 U.S.C. 761 *et seq.* 6
18 U.S.C. 1151 10
28 U.S.C. 2409a 6
28 U.S.C. 2409a(a) 21
43 U.S.C. 270-1 to 270-3 (1970) 21
25 C.F.R. Pt. 151 ..... 5, 19
Section 151.3 19
Section 151.3(a)(1)-(3) 19
Section 151.10 ..... 5, 22
Section 151.10(b) 19
Section 151.10(c) 19
Section 151.10(e) 24
Section 151.10(f) 24
Section 151.10(g) 24
Section 151.11(b) 6
Section 151.11(c) 19
Section 151.11(d) 5, 6, 22

Regulations—Continued: Page

Section 151.12(b) 6, 22
25 C.F.R. Pt. 151 (1995) 24
Section 151.3(a) 5
Section 151.10 5
Section 151.10(b) 5
Section 151.10(c) 5
Section 151.10(e) 5
Section 151.10(f) 5

Miscellaneous:

Cohen's Handbook of Federal Indian Law (Nell Jessup Newton et al. eds., 2005 ed.) 2
45 Fed. Reg. 62,035 (1980) 19
60 Fed. Reg. 32,874 (1995) 5
61 Fed. Reg. 18,082 (1996) 5, 22
70 Fed. Reg. (2005):
p. 71,194 6
p. 71,196 6
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934) 17, 18
S. Rep. No. 1080, 73d Cong., 2d Sess. (1934) 17

In the Supreme Court of the United States

No. 05-1160

STATE OF UTAH, ET AL., PETITIONERS

v.

SHIVWITS BAND OF PAIUTE INDIANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is reported at 428 F.3d 966. The order of the district court granting final judgment in favor of respondents (Pet. App. 40-56) is unreported. The order of the district court concerning the court's jurisdiction to review the Secretary of the Interior's decision to take title to the property at issue here (App., *infra*, 1a-15a) is reported at 185 F. Supp. 2d 1245. The order of the district court denying petitioners' motion for summary judgment on constitutional grounds (Pet. App. 57-78) is not published in the Federal Supplement, but is available at 2001 WL 1806986.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2005. On January 26, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including March 9, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a policy of distributing Indians' tribal lands to individual Indians. See *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987). In addition, tribal lands that were deemed surplus were made available to settlement by non-Indians. See *ibid.* Other statutes of that era similarly provided for the allotment of land to individual Indians on particular reservations. See *id.* at 706-707; *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The allotment policy reduced Indian land holdings from 138 million acres in 1887 to 48 million acres in 1934, and led to a patchwork of ownership on Indian reservations. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); *Cohen's Handbook of Federal Indian Law* 1009 n.337 (Nell Jessup Newton et al. eds., 2005 ed.).

Congress repudiated the policy of allotment in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*).[1] In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25

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[1] The relevant provisions of the IRA, as they presently appear in the United States Code (as amended), are reproduced in an appendix hereto. App., *infra*, 16a-23a.

U.S.C. 461), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2, 25 U.S.C. 462), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)), and prohibited any transfer of Indian lands (other than to the Tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations" (§ 4, 25 U.S.C. 464).

In addition, the IRA authorized or directed the Secretary to undertake specified steps aimed at improving the economic and social condition of Indians, including: acquiring real property "for the purpose of providing land for Indians" (IRA § 5, 25 U.S.C. 465); adopting regulations for forestry and livestock grazing on Indian units (§ 6, 25 U.S.C. 466); proclaiming new Indian reservations or adding to existing reservations with acquired lands (§ 7, 25 U.S.C. 467); assisting financially in the creation of Indian chartered corporations (§ 9, 25 U.S.C. 469); making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of the Tribes (§ 10, 25 U.S.C. 470); paying tuition and other expenses for Indian students at vocational schools (§ 11, 25 U.S.C. 471); and giving preference to Indians for employment in positions relating to Indian affairs (§ 12, 25 U.S.C. 472).

Finally, the IRA included provisions designed to strengthen Indian self-government. Congress authorized Indian Tribes to adopt their own constitutions and bylaws (IRA § 16, 25 U.S.C. 476), to incorporate (§ 17, 25 U.S.C. 477), and to decide, by referendum, whether to opt out of the IRA's application (§ 18, 25 U.S.C. 478).

Petitioners challenge the constitutionality of Section 5 of the IRA. The full text of that Section is as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is ac-

quired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 465.

b. The Secretary has adopted regulations to implement his authority to acquire property under the IRA, which is carried out by the Bureau of Indian Affairs (BIA). See 25 C.F.R. Pt. 151. In this case, the BIA applied the regulations that were in effect in 1994, when the application concerning the property in question was filed. Those regulations set forth the land-acquisition policy and specify the factors that guide the Secretary's evaluation of land acquisition requests. See 25 C.F.R. 151.3(a), 151.10 (1995). The regulations provide that, subject to consideration of the specified factors, land may be acquired in trust for Indians when it is within or adjacent to the Tribe's reservation or tribal land-consolidation area, the Tribe already owns the land, or the acquisition "is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a) (1995). The factors the Secretary considers include "[t]he need of the individual Indian or the tribe for additional land" and "[t]he purposes for which the land will be used," as well as "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" and any other "[j]urisdictional problems and potential conflicts of land use." 25 C.F.R. 151.10(b), (c), (e) and (f) (1995).[2]

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[2] The Secretary amended the land-acquisition regulations in 1995 and 1996. See 60 Fed. Reg. 32,874 (1995); 61 Fed. Reg. 18,082 (1996). The amended regulations retain the same statement of land-acquisition policy and the factors for reviewing an application that are identified in the text. In addition, the amended regulations require the BIA to give notice of a proposed acquisition and an opportunity for comment to state and local governments. 25 C.F.R. 151.10, 151.11(d). If the land in

2. The Shivwits Band of Paiute Indians (Band) is part of a federally recognized Tribe, and appears on the Department of the Interior's list of recognized Tribes pursuant to Congress's restoration of federal recognition in 1980. See 70 Fed. Reg. 71,194, 71,196 (2005); Paiute Indian Tribe of Utah Restoration Act, 25 U.S.C. 761 *et seq.* The Band's income is meager, with revenues in 1999 of only $90,417. Pet. App. 51. The Shivwits Reservation itself is located in a remote area in southwestern Utah, approximately 12 miles northwest of the City of St. George. Pet. C.A. App. 185.

In 1993, the Band entered into discussions with Kunz & Co. (Kunz) and the BIA concerning the potential acquisition of property adjacent to Interstate 15 within the City of St. George for the purpose of pursuing economic development opportunities that would increase the Band's income. Pet. App. 3-4. Kunz proposed that, if the Band acquired the property, Kunz would rent it from the Band for a period of 20 years and construct billboards on the property. *Id.* at 3-4, 51. The land was undeveloped, but was within an area that has been undergoing rapid development. *Id.* at 3-4, 51-52. On August 9, 1994, the Band acquired two parcels of property

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question is neither within nor contiguous to a reservation, the Secretary will give increasing scrutiny to the Tribe's claim of anticipated benefits and increasing weight to any adverse impact of acquisition on the State or locality's regulatory jurisdiction or tax base as the distance of the property from the Tribe's reservation increases. 25 C.F.R. 151.11(b) and (d). Finally, the 1996 regulatory amendment provides a thirty-day period after publication of the Secretary's decision to take land into trust before title is actually acquired, 25 C.F.R. 151.12(b), so that an interested party may bring a judicial challenge to the acquisition. Such a challenge would be barred by sovereign immunity after title is acquired, due to the exception for Indian lands in the Quiet Title Act, 28 U.S.C. 2409a. See pp. 20-22, *infra*.

in a private sale and, on the following day, tendered an application to the BIA to take the property in trust and a special warranty deed for that purpose. *Id.* at 5.

In anticipation of the Band's application, the BIA sent a letter to the City of St. George on August 1, 1994, informing it that the Band was in negotiations to purchase the properties, which were identified by location and tax identification numbers, and asking whether the City supported the Band's endeavor. Pet. App. 4. The City did not respond to the BIA's letter. *Ibid.*[3] The BIA Regional Director concluded that, "since no response was received from the City" to the August 1 letter, "there would be no adverse impact on the local government" from the acquisition. *Id.* at 101. After the BIA completed an environmental assessment of the Band's proposal to lease the parcels to Kunz, it issued a Finding of No Significant Impact on August 31, 1995. *Id.* at 5. On the same day, the BIA approved the Band's request that the property be accepted into trust. *Ibid.* The Band and Kunz then signed twenty-year leases authorizing Kunz to erect and maintain five billboards on the trust lands, which the BIA approved. *Id.* at 5, 51.

On October 25, 1995, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened to bring criminal charges against Kunz if it did not cease construction of the billboards. Pet. App. 6. On November 3, 1995, the City issued a stop-

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[3] Although the regulations in force at the time of the Band's purchase—unlike those in place today, see note 2, *supra*—did not require notice to state or local authorities, the BIA did provide notice to the City in this case. The notice by letter on August 1, had, in fact, been preceded by informal oral notice to the City Manager on July 7, 1994. Pet. App. 4. The City Manager indicated at that time that the City would not provide a letter in support of the application. *Ibid.*

work order purporting to forbid Kunz from erecting the billboards. *Ibid.*

3. In response to the State and City's actions, the Band and Kunz filed suit against the State of Utah, the Utah Department of Transportation, and the City of St. George in the United States District Court for the District of Utah on November 17, 1995, seeking injunctive and declaratory relief. Pet. App. 6. On February 7, 1996, the district court entered a preliminary injunction barring petitioners from interfering with the construction of the billboards. *Id.* at 7 n.3.

Petitioners filed counter-claims against the Band and Kunz and third-party claims against the Secretary and other Department of the Interior officials and the BIA. Among other claims, petitioners sought a declaration that Section 465 is an unconstitutional delegation of Congress's legislative authority. Pet. App. 6-7.

On cross-motions for summary judgment, the district court rejected petitioners' constitutional challenge. Pet. App. 64. The court noted that the Tenth Circuit had squarely rejected the nondelegation argument in *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000), holding that Congress had placed limits on the Secretary's discretion by providing ascertainable standards against which a reviewing court could test the Secretary's exercise of that authority. Pet. App. 64. The court did, however, hold that the Secretary had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, by failing to prepare an environmental assessment of the decision to accept the land into trust, separate and apart from the environmental assessment prepared (before the land was taken into trust) with respect to the proposed lease agreements between the Band and Kunz.

Pet. App. 64-78. The court held that the decision to take the land into trust was therefore invalid and ordered the BIA to undertake an environmental assessment of the acquisition decision. *Id.* at 78. Because the court believed that the government's sovereign immunity defense, discussed below, did not apply to petitioners' NEPA claim, it did not address that issue. *Id.* at 62 n.7.

Petitioners asked the court to vacate its opinion and renewed their motion for summary judgment. The federal respondents, in turn, renewed their argument that the United States' sovereign immunity barred petitioners' claims, including those under NEPA, that challenged the Secretary's decision to take title to the property in trust for the Band. App., *infra*, 2a, 8a. In an opinion dated February 6, 2002, the district court agreed with the federal respondents that "[t]he Indian lands exception to the [Quiet Title Act, 28 U.S.C. 2409a(a) (QTA)] bars the State's claim in this case even though the State claims the right to regulate the lands in question, because * * * underlying the State's claim is a challenge to the government's title to the land." App., *infra*, 11a. Yet, despite that conclusion, the court held that "under the APA, the decision by the BIA to accept the land in trust is subject to judicial review under NEPA," *id.* at 13a, and it deferred consideration of petitioners' other claims until the NEPA process had been completed. *Id.* at 14a-15a.

After the NEPA review was finished, the BIA determined that it would neither remove the land from trust status nor deny approval of the billboard leases. Pet. App. 45. After the BIA had issued its final determination, the district court ruled on the parties' cross-motions for summary judgment. *Id.* at 40-56. The court held that the parcels were Indian country within the

meaning of 18 U.S.C. 1151, Pet. App. 45, and that there was no basis upon which the petitioners could regulate the use of the tribal trust land for outdoor advertising, *id.* at 45-55. The court therefore granted summary judgment in favor of respondents. *Id.* at 55.

4. The court of appeals affirmed. Pet. App. 1-39. The court first rejected petitioners' argument that Section 465 is an unconstitutional delegation of legislative authority. The court adhered to its decision in *Roberts* that Section 465 "itself places limits on the Secretary's discretion," including the requirement that lands be acquired for Indians as defined by Congress, the prohibition against acquiring land for Navajos outside their reservations, and the overarching statutory purposes, identified in the legislative history, of "rehabilitating the Indian's economic life and developing the initiative destroyed by . . . oppression and paternalism of the prior allotment policy." *Id.* at 11-12 (quoting *Roberts*, 185 F.3d at 1137) (internal quotation marks omitted).

The court of appeals rejected petitioners' argument that this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), required that *Roberts* be reconsidered. Pet. App. 13-14. Although the court agreed that *Whitman* makes clear that an agency cannot cure an unconstitutional delegation of power by declining to exercise some of its delegated authority, *id.* at 13, the court of appeals held that Section 465 does not violate that principle because "the statute itself provides standards for the Secretary's exercise of discretion," *id.* at 12 (quoting *Roberts*, 185 F.3d at 1136 n.8).

The court of appeals went on to hold that, "[i]n light of the QTA's Indian trust land exemption," the district court "lacked subject matter jurisdiction over [petitioners'] counterclaim and third-party claim to the extent it

sought to challenge the BIA's decision to take the property at issue into trust for the Band," and that the district court had therefore erred in considering petitioner's NEPA challenge to the land acquisition. Pet. App. 18.

Finally, the court rejected petitioners' claim that, assuming the validity of the Secretary's acquisition of the land in trust for the Band, the State and City could still assert regulatory authority over the placement of billboards on the land. Congress had not, the court held, authorized the State to regulate outdoor advertising on Indian trust land pursuant to the Highway Beautification Act of 1965, 23 U.S.C. 131(h). Pet. App. 27-28. Nor did the State possess inherent authority to regulate the maintenance of billboards in Indian country. Considering the interests of petitioners and those of respondents, *id.* at 29 (citing *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)), the court found that "there are significant federal interests at play here," whereas "the State has failed * * * to establish that its interests in regulating the land are substantial," *id.* at 30, 32. The court stressed that the Band's other sources of revenue were "not adequate . . . to properly operate functions of, or provide economic development for, the Band," that "the Band's income from the leases of the parcels at issue now constitutes its greatest source of revenue," and that the Band would have freedom at the end of the lease terms to develop the property for economic use, including possibly "for housing by Band members, the majority of whom, at the present, are forced to live off-reservation." *Id.* at 31 (internal quotation marks omitted).

Judge Lucero concurred in the panel's opinion, but wrote separately to add a discussion concerning the ap-

plication of the Highway Beautification Act to Indian lands. Pet. App. 34-39.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, as discussed below, see pp. 20-22, *infra*, this case presents a threshold jurisdictional obstacle that would prevent the Court from reaching the question on which petitioners seek review. Further review by this Court is therefore unwarranted.

1. Notably, petitioners do not contend that review by this Court is necessary to resolve a conflict among the courts of appeals. Rather, as petitioners concede (Pet. 11-12), each of the courts of appeals that has considered a constitutional challenge to Section 465 on nondelegation grounds has rejected that argument. See Pet. App. 9-14; *South Dakota* v. *United States Dep't of the Interior*, 423 F.3d 790, 795-799 (8th Cir. 2005) (*South Dakota II*), petition for cert. pending, No. 05-1428 (filed May 8, 2006); *Carcieri* v. *Norton*, 2005 WL 2216322, **8-**9 (1st Cir. Sept. 13, 2005); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688, 694, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997).[4]

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[4] The First Circuit panel's amended opinion in *Carcieri* was originally reported at 423 F.3d 45. Appellants filed a petition for rehearing en banc on November 7, 2005, which did not raise the nondelegation issue. The court thereafter requested that the opinion be withdrawn from the bound volume of the Federal Reporter. The editor's note at 423 F.3d 46-72 makes clear, however, that the decision has not been vacated or withdrawn. To date, the court has taken no action on the petition for rehearing en banc. See No. 03-2647 Docket.

[continued . . .]

Nor is the issue presented one of urgent importance. To the contrary, the statutory provision that petitioners seek to have invalidated was enacted nearly seventy years ago. For seven decades, Section 465 has provided the primary mechanism for the federal government to restore and replace tribal lands, which Congress concluded was crucial to promote tribal self-government and economic self-sufficiency. See pp. 16-19, *infra*. Congress has, moreover, revisited and amended the IRA on numerous occasions, including subsequent to the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that guide his land-acquisition policies.[5] In fact, this Court has remarked that "Section 465 provides the proper avenue" for a Tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill* v. *Oneida Indian Na-*

Petitioners observe (Pet. 7-8) that a divided panel of the Eighth Circuit had upheld a nondelegation challenge to Section 465 in *South Dakota* v. *United States Dep't of the Interior*, 69 F.3d 878 (1995) (*South Dakota I*). This Court, however, vacated the panel's decision in *South Dakota I*, and remanded the matter to the Secretary of the Interior to reconsider his administrative decision and to permit judicial review in light of newly amended regulations. *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996). Accordingly, *South Dakota I* has no precedential effect, see *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect."), and the Eighth Circuit has itself repudiated its reasoning, see *South Dakota II*, 423 F.3d at 796-797.

[5] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465 to all Tribes).

tion, 544 U.S. 197, 221 (2005). See also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998).

The Court previously declined to grant review on the delegation issue in *Roberts*, which the Tenth Circuit followed in this case, and the same disposition is warranted in this case as well.

2. Despite the uniform appellate decisions upholding the constitutionality of Section 465, petitioners urge (Pet. 11-16) that the Court should grant a writ of certiorari to review the court of appeals' application of this Court's decisions in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), and *Mistretta* v. *United States*, 488 U.S. 361 (1989). The court of appeals' application to a particular statute of well-settled principles regarding the conferral of authority on the Executive Branch does not warrant this Court's review. In any event, contrary to petitioners' contentions, the courts of appeals have carefully considered and correctly applied this Court's nondelegation precedent.

a. It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). Accord *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

Although "in 1935 [the Court] struck down two delegations for lack of an intelligible principle," the Court has "since upheld, without exception, delegations under standards phrased in sweeping terms." *Loving* v. *United States*, 517 U.S. 748, 771 (1996); see, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding a statute authorizing the War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944) (upholding a statute authorizing the Price Administrator to set prices that are "generally fair and equitable and will effectuate the purposes of [the Emergency Price Control] Act"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding a statute authorizing the Federal Communications Commission to regulate broadcasting according to the "public interest, convenience, or necessity").

In *Whitman* itself, this Court reversed the court of appeals' determination that the Clean Air Act, 42 U.S.C. 7409(b)(1), unconstitutionally delegated Congress's legislative power to the Environmental Protection Agency to set national air quality standards. 531 U.S. at 472. The Court emphasized that "[i]n the history of the Court [it has] found the requisite 'intelligible principle' lacking in only two statutes," and that it had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting), and citing *id.* at 373 (majority opinion)). The Court noted that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and that in the two statutes struck down on nondelegation grounds, one "provided

literally no guidance for the exercise of discretion," and the other "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id.* at 474, 475 (citing *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935)). The Court stressed that it had never required "that statutes provide a determinate criterion for saying how much of the regulated harm is too much." *Id.* at 475 (internal quotation marks and alteration omitted).

b. The courts of appeals have correctly (and uniformly) held that "the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust" to withstand constitutional challenge. *South Dakota II*, 423 F.3d at 797.

Section 465 itself contains a number of express indications of Congress's policy. That section states that the purpose of the Secretary's land-acquisition authority is "providing land for Indians," which is a narrow group of individuals defined in 25 U.S.C. 479. See 25 U.S.C. 465. Section 465 provides a limited amount of federal funds to be used for the purpose and expressly forbids the use of those funds to acquire land for Navajo Indians outside of their established reservation boundaries. *Ibid.* Finally, Section 465 specifies that lands taken into trust "shall be exempt from State and local taxation." *Ibid.*

In addition to the text of Section 465 itself, the boundaries of the Secretary's delegated authority to acquire land in trust for Indians may be discerned from the purposes of the IRA as a whole, its factual background, and the statutory context. *American Power & Light*, 329 U.S. at 104; *Lichter*, 334 U.S. at 785. Con-

gress enacted the IRA to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152-154 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); accord *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress was particularly concerned with reversing the "disastrous" consequences of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the tribal land base and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 & n.5 (1994). Congress identified "conserv[ing] and develop[ing] Indian lands and resources" as one of the purposes of the IRA. 48 Stat. 984.

Accordingly, the IRA expressly repudiates the allotment policy, 25 U.S.C. 461, and contains several provisions designed to preserve and expand tribal lands. 25 U.S.C. 462, 463(a), 464, 465. Other provisions of the IRA likewise reflect Congress's policy of promoting the economic development and self-governance of the Indian Tribes. 25 U.S.C. 469, 470, 471, 472, 476, 477. The authority under Section 465 to acquire land in trust is intended to further those purposes.

The IRA's legislative history confirms the congressional purpose that is evident from the text. As the Eighth Circuit observed in *South Dakota II*, the repeated references in the House and Senate Reports as well as floor debates to the goal of providing land to "Indian individuals and tribes whose land holdings are insufficient for self-support," 423 F.3d at 798 (quoting S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934)), reflect that "Congress placed primary emphasis on the needs of in-

dividuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support," *ibid.*[6]

The purposes of the IRA as reflected in its text, structure, context, and history provide the intelligible principles that guide the Secretary in the exercise of his authority under Section 465. The Secretary may acquire land "for the purpose of providing land for Indians," within the intent of Section 465, when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base. Indeed, this Court has often identified those policies as the Congressional purposes that guide the Secretary's application of the IRA. See *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe*, 411 U.S. at 152 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, *supra*, at 6); see also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S.

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[6] As they did in the court below, petitioners assert that this Court's decision in *Whitman* "precludes resort to legislative history" for determining whether a statute sufficiently guides the exercise of the authority it delegates. Pet. 15. However, as the court of appeals correctly observed (Pet. App. 13 n.4), *Whitman* does not address that issue in any way, and this Court has repeatedly made clear that a statute's purpose, factual background, and context are properly considered in determining whether a statute meets this test. See, *e.g.*, *American Power & Light*, 329 U.S. at 104; *Lichter*, 334 U.S. at 778-779.

134, 168 (1980) (Brennan, J., concurring in part and dissenting in part) (noting that the IRA reflects both the "policy of encouraging tribal self-government" and the "complementary interest in stimulating Indian economic and commercial development").

Consistent with this long-established focus of the IRA, the Secretary has recognized that Section 465 does not confer boundless discretion. For example, in adopting a regulatory statement of land-acquisition policy under Section 465, the Secretary expressed his understanding that "[t]he policy * * * is within the scope of existing statutory authority and * * * reflects Congressional intent." 45 Fed. Reg. 62,035 (1980). The Secretary has, moreover identified through regulation the specific factors, derived from the purposes of the IRA and the Secretary's experience in administering it, that guide his decisions to take lands into trust for Tribes and individual Indians. See 25 C.F.R. Pt. 151.[7] By setting out ascertainable standards that govern trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the limiting principles in the IRA. Cf. *Lichter*, 334 U.S. at 783 (recogniz-

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[7] As discussed above, see p. 5 *supra*, the regulations set forth a "Land acquisition policy," 25 C.F.R. 151.3, which provides for acquisitions in three circumstances: when the land is within or adjacent to an existing reservation, when the land is already owned by the Tribe, or when "the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(1)-(3). The regulations then set forth particular factors to guide the Secretary's decision whether to acquire such land, including "[t]he need of the individual Indian or the tribe for additional land" (25 C.F.R. 151.10(b)), "[t]he purposes for which the land will be used" (25 C.F.R. 151.10(c)), and, if the land is outside a reservation and is to be used for a tribal business purpose, "the anticipated economic benefits associated with the proposed use" (25 C.F.R. 151.11(c)).

ing that subsequent "administrative practices" under a statute may demonstrate the "*definitive adequacy*" of the terms of the statutory authorization).

Moreover, in an area in which the Executive has historically exercised expansive authority, such as the supervision of lands occupied by Indians,[8] broader directives are especially appropriate. Cf. *Whitman*, 531 U.S. at 475 (noting that "the degree of agency discretion that is acceptable varies"); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing that Congress may accord to the President a greater degree of discretion in the area of foreign affairs than would be acceptable if only domestic affairs were involved); *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (upholding a broad conferral of authority on various Indian Tribes to regulate the introduction of liquor into Indian country on the ground that limitations on Congress's authority are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter").

3. Even if the question on which petitioners seek review otherwise warranted this Court's consideration, this case would not present a good vehicle by which to do so. As the court of appeals held, "[i]n light of the QTA's Indian trust lands exemption, * * * the district court in this case lacked subject matter jurisdiction over * * * [petitioners' third-party complaint] to the extent it sought to challenge the BIA's decision to take the property at issue into trust for the Band." Pet. App. 18. Although the court of appeals did not apply its jurisdic-

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[8] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

tional holding to petitioners' claim that the Secretary's statutory authority to take the property into trust was itself unconstitutional, the court's reasoning encompasses petitioners' constitutional challenge to Section 465 and would prevent this Court from reaching the constitutional question on which petitioners seek review.

This Court has recognized that the provision of the QTA that prohibits suits that challenge the United States' title in lands held in trust for Indians, 28 U.S.C. 2409a(a), may bar a claim even if the plaintiff does not characterize it as one brought under the QTA. *United States* v. *Mottaz*, 476 U.S. 834, 841-842 (1986); *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 284-285 (1983). Several circuits, including the court of appeals in this case, have held that the Indian lands exception bars claims that are purportedly brought under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, but would have the effect of declaring a completed acquisition of lands in trust for Indians to be void. See Pet. App. 18-19; *Neighbors for Rational Dev., Inc.* v. *Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004) (QTA barred APA action challenging Secretary's acquisition of land in trust under Section 465 as violating NEPA); *Alaska* v. *Babbitt*, 75 F.3d 449, 452-453 (9th Cir. 1995) (QTA barred APA claim that Bureau of Land Management's approval of Indian's allotment under 43 U.S.C. 270-1 to 270-3 (1970) (repealed 1971), was ultra vires), cert. denied, 519 U.S. 818 (1996); *Florida* v. *United States Dep't of the Interior*, 768 F.2d 1248, 1250, 1254-1255 (11th Cir. 1985) (QTA barred APA challenge to the acquisition of land in trust for the Seminole Tribe as violating regulatory standards), cert. denied, 475 U.S. 1011 (1986). See also *Shawnee Trail Conservancy* v. *United States Dep't of Agric.*, 222 F.3d 383, 388 (7th Cir.

2000) (plaintiffs' constitutional and statutory challenge to the Forest Service's authority to restrict the use of certain roads that plaintiffs claimed were subject to public rights of way could only be brought pursuant to the QTA), cert. denied, 531 U.S. 1074 (2001).

The jurisdictional question whether the QTA bars any claim that challenges the Secretary's authority to acquire title to the land here in question does not itself warrant this Court's consideration. That threshold question should not arise in future cases in which parties seek to challenge the Secretary's acquisition of land pursuant to Section 465. The land acquisition at issue in this case proceeded pursuant to the 1994 version of the regulations. As noted above, see note 2, *supra*, the Secretary amended the governing regulations in 1995 and again in 1996. The present regulations require that notice of proposed land acquisitions be sent to state and local authorities to provide them an opportunity to comment on the acquisition's potential impacts before the Secretary makes his determination. 25 C.F.R. 151.10, 151.11(d). The regulations also provide a thirty-day period between publication of the Secretary's decision to take land into trust and when the United States takes title to any property, so that a state or local government, like petitioners, may challenge the Secretary's decision in court without the obstacle of the QTA. 25 C.F.R. 151.12(b); 61 Fed. Reg. at 18,082.

We are informed by the Department of the Interior that this is the only pending case challenging a land acquisition that preceded the 1995 and 1996 amendments to the regulations. Because the threshold jurisdictional question would likely prevent the Court from reaching the question on which petitioners seek review, and cannot be expected to arise with any frequency in the fu-

ture, this case represents a poor vehicle for this Court to resolve the question presented by petitioners, even if that question otherwise warranted review.

4. Petitioners' assertion (Pet. 17) that the Secretary's authority under Section 465 to acquire land in trust for Indians "imposes significant hardships on state and local governments nationwide" provides no basis for granting the petition.

Petitioners contend that the taking of property in trust for Indians limits the ability of state and local governments to "enforce needed land use and development restrictions uniformly," Pet. 19, leads to a loss of tax revenues, *ibid.*, and exacerbates "tensions between state and local governments on the one hand and tribes and the BIA on the other," Pet. 21. Those arguments have nothing to do with petitioners' constitutional claim that Section 465 lacks an "intelligible principle" to guide the Secretary's exercise of his authority under Section 465. Rather, petitioners' arguments represent a disagreement with the IRA's conceded policy of promoting tribal self-sufficiency and sovereignty, including Congress's explicit policy determination to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465; see *Rice* v. *Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

Moreover, petitioners ignore that the Secretary's regulations address the very concerns they raise here. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section] 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory.").

The regulations direct the BIA, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when, as was true in this case, the land to be acquired is held in unrestricted fee status, the BIA considers "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g).

Indeed, although petitioners make repeated references to what they view as the Secretary's "abuse" of his statutory authority in granting the Band's application to take the land into trust and approving the billboard leases, see Pet. 10-11, 17-19, 21, it is notable that petitioners made the strategic decision not to pursue their claim that the trust acquisition in this case violated the statutory and regulatory standards established in 25 U.S.C. 465 and 25 C.F.R. Pt. 151 (1995). In petitioners' initial complaint, they asserted, as their seventh cause of action, a claim that the "BIA has failed to comply with the requirements of the IRA * * * and the regulations applicable thereunder in accepting the lands into trust on behalf of the Shivwits band." Answer, Countercl. & Third-Party Claim para. 62. In their amended third-party claim, however, petitioners omitted that claim and inserted a new seventh cause of action under the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2) and (3). See First Amended Answer, Countercl. & Third-Party Claim paras. 61-67. In light of the fact that petitioners abandoned the legal theory by which they could have challenged directly the merits of the Secretary's applica-

tion of Section 465, petitioners' claim that only a declaration that the statute is unconstitutional can remedy the Secretary's supposed excesses rings hollow.

In any event, as the district court and court of appeals each held in addressing a separate argument raised by petitioners, the Secretary's decision to take the land into trust did, in fact, serve Congress's purposes in adopting the IRA. Pet. App. 31; *id.* at 50-52. "[T]he Band's income from the leases of the parcels at issue now constitutes its greatest source of revenue," *id.* at 31, in what is a "meager revenue stream," *id.* at 3. Most importantly, the arrangement will allow the impoverished Band, after the twenty-year leases, to own property in a rapidly developing area where it can be put to use for greater economic purposes or to meet pressing housing needs. *Id.* at 31. The arrangement approved by the Secretary, which the lower courts found to be "of vital economic importance to the Shivwits," *id.* at 54, is entirely consistent with the purposes that the IRA was intended to serve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2006

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. 2:95CV1025C

SHIVWITS BAND OF PAIUTE INDIANS; AND KUNZ & COMPANY D.B.A. KUNZ OUTDOOR ADVERTISING, A CALIFORNIA CORPORATION, PLAINTIFFS AND COUNTER-CLAIM DEFENDANTS

v.

STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, AND ST. GEORGE CITY, A UTAH MUNICIPAL CORPORATION, DEFENDANTS AND COUNTER-CLAIM AND THIRD-PARTY PLAINTIFFS

v.

BRUCE BABBITT, IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; ADA DEER, IN HER CAPACITY AS ASSISTANT SECRETARY OF INDIAN AFFAIRS; WALTER R. MILLS, IN HIS CAPACITY AS AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS; AND THE BUREAU OF INDIAN AFFAIRS, THIRD-PARTY DEFENDANTS

Feb. 6, 2002

ORDER

CAMPBELL, District Judge.

This matter is before the court on Defendants' motions to vacate order of preliminary injunction and for summary judgment. The court held a hearing on these motions on October 24, 2001. Defendants currently move to vacate this court's earlier preliminary injunction order, which prevented them from regulating the use of the land at issue in this suit. They also seek summary judgment on the question of State and local land regulation, arguing that the land is neither held in trust for the tribe nor that it is "Indian Country," either of which designation could prohibit State regulation. For the reasons discussed below, Defendants' motions to vacate and for summary judgment are DENIED.

Background

The relevant material facts to the underlying dispute in this matter remain unchanged from those before the court when it issued its August 11, 2000 order. This case involves the purchase and subsequent leasing of property adjacent to Interstate Highway 15 within the St. George, Utah limits ("subject property"). On July 16, 1993, Plaintiff Kunz and Company, doing business as Kunz Outdoor Advertising ("Kunz"), contacted Plaintiff Shivwits Band of Paiute Indians ("Shivwits") and proposed a business venture (Kunz and Shivwits are hereinafter collectively referred to as "Plaintiffs"). Kunz proposed that the Shivwits purchase the subject property with money furnished by Kunz. In exchange, the Shivwits would agree to lease the subject property

back to Kunz on favorable terms.[1] The Shivwits agreed to the proposal, were advanced money by Kunz, and bought two pieces of land on August 9, 1994. The land is located in Defendant St. George City, which is a long distance from the Shivwits Reservation. There is no activity on the land other than the outdoor advertising. On the same day, August 9, 1994, the Shivwits conveyed, by Special Warranty Deed, the subject property to the United States to be held in trust for the Shivwits. (*See* Special Warranty Deed, attached as Ex. B to the Complaint.) The United States therefore holds title to the land by virtue of this deed.

An off-reservation trust acquisition, like the one at issue here, however, must be approved by the Department of the Interior. On May 10, 1995, Shivwits, through the Bureau of Indian Affairs ("BIA"), submitted the necessary administrative documents for approval of the trust acquisition. The request that the property be accepted in trust was approved on August 31, 1995, by the local office of the BIA. Following acceptance of the subject property in trust, the parties entered into five separate leases covering the subject property. After an environmental assessment of the proposal as required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 ("NEPA"), which concluded with a Finding of No Significant Impact ("FONSI"), the Secretary of Interior approved the lease arrangement on September 11, 1995.[2]

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[1] The lease transaction involves no payment to the Shivwits for fifteen (15) years and small ($2,500 per year) payments for the next five years.

[2] The approval of the Secretary of the Interior of the lease arrangement was necessary to give the leases effect. *See* 25 U.S.C. § 415.

No one disputes that under State (Utah Outdoor Advertising Act, Utah Code Ann. § 27-12-136.1)[3] and local law (a St. George ordinance, St. George City Code, Title 9, chapter 8),[4] the placement of billboards on the subject property would be unlawful. Plaintiffs argue that the billboards are exempt from these laws because the subject property is being held by the United States in trust for the Shivwits.

On October 25, 1995, the Utah Attorney General's office, on behalf of the Utah Department of Transportation ("UDOT"), threatened criminal suit against Kunz if construction of the signs did not immediately cease. Kunz ignored the warning and continued construction. On November 3, 1995, St. George City issued a stop work order, forbidding Kunz from further construction of the signs on the ground that it violated city and State outdoor advertising regulations and Kunz had no city or State sign permits. On November 17, 1995, Plaintiffs jointly sued for declaratory judgment and preliminary and permanent injunctive relief against the State of Utah, the Utah State Department of Transportation, and the City of St. George (collectively referred to herein as "Defendants"). On November 22, 1995, Defendants jointly filed an Answer, Counterclaim and

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[3] The statute designates certain areas where outdoor advertising may be placed, and the proposed location does not meet the requirements of any of those exceptions. In addition, the signs violate State law because Plaintiffs lack a valid State permit as required by Utah Code Ann. § 27-12-136.7(1). The placement or maintenance of the signs would be a criminal misdemeanor under Utah Code Ann. § 27-12-136.12.

[4] St. George Code §§ 9-8-4(B)(4) and 9-8-2(Q) govern off-premise signs. The Plaintiffs' signs violate these Code sections in that they violate spacing requirements and would not meet any of the exceptions for allowance of signs.

Third-Party Claim against the Shivwits, Kunz, and the United States. The counterclaim and third-party claim allege that 25 U.S.C. § 465, the statute authorizing land acquisitions, is unconstitutional, the taking of the land in trust and the approval of the lease was wrongly accomplished, and that the land is subject to State and local regulations.

This court issued a preliminary injunction, dated February 7, 1996, which prohibited the Defendants from imposing any stop work order or otherwise interfering with the construction or use of the billboards. Protected by this injunction, Kunz erected five large billboards on the subject property and the billboard space has been leased by Kunz to various advertisers. The billboards continue to be used by Kunz. Subsequent to the preliminary injunction order, the court issued an order on August 11, 2000, which held that 25 U.S.C. § 465 is, in fact, constitutional, but also held that the BIA had failed to follow the procedural requirement of NEPA before making the *decision* to hold the land in trust. That order did not affect the fact that the government held the land in trust by special warranty deed, but it did invalidate the agency's decision to take the land in trust until the BIA complied with the procedural requirements of NEPA.

The Defendants' present motions to vacate preliminary injunction and for summary judgement are based on an argument that the billboards should not have been there to begin with for two alternative reasons: 1) that the court's August 11, 2000 order invalidated any trust relationship regarding the land, *de facto* and *de jure*, and that therefore the Shivwits hold the land as any other entity (rather than the government holding it in trust for the Shivwits) and that therefore the State's

and local municipalities' zoning and land use restrictions apply; and 2) that even if the court finds that the government holds the land in trust, the land is not "Indian Country" and therefore State and local land use restrictions apply.

Regarding the first ground for summary judgment outlined above, because the Indian Lands exemption in Quiet Title Act, 28 U.S.C. § 2409a(a) ("QTA"), applies, the government is immune from questions to the title presently at issue. Regarding the second ground for summary judgement argued by the Defendants, the issue as presently postured is not ripe because the BIA has not completed the NEPA process as was mandated the August 11, 2000 order, and therefore there is no final agency decision which settles the status of the land at issue. As discussed below, the court may not rule on the merits of the second argument supporting summary judgement because those issues are not ripe and doing so would be to render an advisory opinion, which the United States Constitution prohibits.

Analysis

A. *Does the Quiet Title Act Prohibit Judicial Review, thereby Suggesting that the Matter be Deferred Until the Presently Ongoing NEPA Process is Complete?*

The initial question posed by Defendants' motions is: what effect, if any, did the court's August 11, 2000 order have on the title already possessed by the government by virtue of the special warranty deed? The answer to this question is: "none." This answer results from the distinction between two government actions present here, both of which have direct bearing on this matter: 1) the government *holding* title to Indian lands (which

it already does in this case *de facto* by virtue of the special warranty deed); and 2) the agencys' (the BIA and the Department of Interior) action of *approving* the trust application. The latter action requires that the agency undertake the NEPA process as the August 11, 2000 order mandated; the former is not subject to judicial review because the Indian lands exemption of the QTA renders the government immune from suit from third parties (here, the Defendants) who challenge the government's title to Indian lands.

There is one glaring fact in this case: right now, the United States holds title to the land by warranty deed. As far as the title issue goes, the Defendants' argument rests on the assumption that the transfer was invalid at its inception because of the NEPA violation, and therefore the Shivwits, not the government, now hold title. Implicitly, if not explicitly, then, the relief for which Defendants ask depends, in part, upon this court first quieting title.

It is a well-established rule that the United States is immune from suit unless Congress expressly waives immunity. *See United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Amalgamated Sugar Co.* v. *Bergland*, 664 F.2d 818 (10th Cir. 1981). Although the Defendants filed their claims against the Secretary of the Interior and his agents, in their official capacities, the claims truly run against the United States because Defendants' claim rests on a title determination and the United States holds title by virtue of the special warranty deed. The only statute cited by the Defendants to support their claim that there has been a waiver of sovereign immunity is the Administra-

tive Procedure Act, 5 U.S.C. § 702 ("APA").[5] Although the Government does not dispute that the APA generally waives sovereign immunity, the government argues that this general waiver of sovereign immunity is superseded by the QTA, which preserves immunity in the case of suits challenging the title to "trust or restricted Indian lands" held by the United States.[6]

On the issue of immunity, both Plaintiffs and Defendants are, in part, correct. The Defendants are correct that the APA's procedural protections apply here and allow judicial review of the decision to approve the taking of land into trust (which requires NEPA compliance as recognized and mandated in the court's August 11, 2000 order). But the government is correct that its right to hold title in trust is unreviewable under the QTA. Therefore, although the BIA must complete the NEPA process, the title to the property remains with the government in trust for Shivwits.

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[5] In relevant part, 5 U.S.C. § 702 says:

> An action [in federal court] seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority, *shall not be dismissed nor relief therein be denied on the ground that it is against the United States* or that the United States is an indispensable party.

Id. (emphasis added).

[6] In relevant part, 28 U.S.C. § 2409a(a) says:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section *does not apply to trust or restricted Indian lands*. . . .

Id. (emphasis added).

The government correctly argues that this case is similar to *Florida Dept. of Business Regulation* v. *Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985), in which the court found no waiver of immunity from suit. In that case, an Indian tribe purchased certain lands containing Indian burial remains with the purpose of preserving the remains and establishing a museum. The United States, as here, took the property into trust by virtue of a deed. Along with the museum, the tribe opened a smoke shop, selling cigarettes tax free to the general public. The State of Florida sought to have the trust decision overturned under the APA on the grounds that the Secretary of the Interior had violated that law by failing to follow the Department's regulations when acquiring the land in trust. The Eleventh Circuit Court of Appeals upheld the dismissal on the grounds that the district court lacked jurisdiction to hear the case. The appellate court held that although the suit was "technically not one to quiet title, . . . Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here." *Id.* at 1254.

The Defendants argue that the Tenth Circuit decision *McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997), rejects the Eleventh Circuit's reasoning in *Florida* and demonstrates that the QTA is not a barrier to issue of title presently before this court. In *McAlpine*, the Tenth Circuit considered a case where a Native American sued the United States and BIA after his request that land be taken into trust was denied. The *McAlpine* Court then concluded that the Secretary of Interior's *denial of acquisition* of land to be held in trust is reviewable under the APA. *See McAlpine*, 112 F.3d at 1435. This guidance from the Tenth Circuit,

however, is not helpful to answer the legal issue here. As the government points out, *McAlpine* deals with a situation where the United States *did not* acquire title; this case deals with the situation where the United States *did* in fact acquire title. The acquisition of title divests this court of jurisdiction to challenges to the United States' right to title as the *Florida* Court recognized. *See Florida*, 768 F.2d at 1254-55.

Several federal courts treating similar issues have made similar distinctions. With regard to the QTA Indian lands exemption generally, "[a]s long as the United States has a 'colorable claim' to a property interest based on that property's status as trust or restricted Indian lands, the QTA renders the government immune from suit." *State v. Babbitt*, 75 F.3d 449, 451-52 (9th Cir. 1995) *cert. denied* 519 U.S. 818, 117 S. Ct. 70, 136 L. Ed. 2d 30 (1996) [hereinafter "*Alaska I*"]. In addition, the question of whether the government has a colorable claim "extends no further than 'a determination that the government had some rationale,' and that its position 'was not undertaken in either an arbitrary or frivolous manner.'" *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999). Such a limitation is consistent with the rule that "[t]he immunity of the government applies whether the government is right or wrong. The very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position." *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). Not only does the present case deal with facts quite different from those in *McAlpine*, it deals with facts that clearly show that the government now holds title by virtue of a special warranty deed, a document surely signifying at least a "colorable claim."

The Indian lands exception to the QTA bars the State's claim in this case even though the State claims the right to regulate the lands in question, because, as discussed above, underlying the State's claim is a challenge to the government's title to the land. *See Rosette Inc. v. United States*, 141 F.3d 1394 (10th Cir. 1998); *Shawnee Trail Conservancy v. United States Dept. of Ag.*, 222 F.3d 383 (7th Cir. 2000). Moreover, while no parties cite these cases, there are cases in which the Indian Lands exemption under the QTA was held to apply even though it was unclear whether the land was, or ultimately would be, held in trust for Indians. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 903 (D. Mass. 1977) (finding that government had not waived immunity even if it had not been determined that the land at issue is "trust or restricted Indian lands" within meaning of QTA exemption provision); *accord State of Alaska v. Babbitt*, 38 F.3d 1068 (9th Cir. 1994) [hereinafter "*Alaska II*"]. Indeed, other courts have explicitly held that "Congress did not intend to waive its sovereign immunity with respect to quiet title action in cases which *would* impact on Indian ownership rights." *Newman v. United States*, 504 F. Supp. 1176, 1178 (D. Ariz. 1981) (emphasis added). In *Newman*, the court found irrelevant the fact that there had been *no definative prior determination* of whether the disputed land was "trust or restricted Indian lands" with regard to the issue of whether the government enjoyed immunity under statute; rather the court found that the claim to title asserted by the government merely had to be substantial. *Id.* at 1178-79. As such, the Indian lands exemption to the QTA prohibits disturbing the government's holding title, even though the procedural posture of this case has mandated that the

BIA conduct NEPA review before issuing a decision to hold the title in trust.

Admittedly, there is an ambiguity or tension in the distinction between the act of the government holding title and the act of the BIA deciding to hold the land in trust. Under binding Supreme Court and Tenth Circuit precedent, however, such tensions and ambiguity do not suggest a different disposition of the matter and, indeed, suggest rather that such ambiguities are resolved in favor of the Shivwits. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) (quotation marks, citation, and alteration omitted). In issues arising under Indian law, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id. citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L.Ed. 941 (1912); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000); *Newman*, 504 F. Supp. at 1178-79. Interpreting the QTA as the courts above suggest is not only supported by these canons of statutory interpretation, but also by the legislative intent behind the Indian lands exception to the QTA. That history demonstrates that Congress intended to prevent prejudice to Indian rights and to prevent the abridgment of "the historic relationship between the Federal Government and the Indians without the consent of the Indians." Quiet Title Act, Pub. L. 92-562, 1972 U.S. Code Cong. & Admin. News, pp. 4547, 4557. As the *Newman* court put it: "It is clear,

therefore, that Congress did not intend to waive its sovereign immunity with respect to quiet title action in cases which *would* impact on Indian ownership rights." 504 F. Supp. at 1178 (emphasis added).

In sum, therefore, the Indian lands exception to the QTA bars disturbing the government's title in trust to the subject property in dispute. This finding leaves the matter in the following situation. The government's *claim* to title in trust remains undisturbed (indeed barred from judicial review by the QTA). Nevertheless, under the APA, the decision by the BIA to accept the land in trust is subject to judicial review under NEPA. Thus, the procedural requirements mandated by the August 11, 2000 order still stand, as does the court's preliminary injunction order. The Defendants' remedy is largely procedural. Defendants cannot challenge the status of the title in trust, as prohibited by the QTA. However, Defendants may challenge the procedures taken in reaching the *decision* by the BIA to hold the land in trust, as recognized in the court's previous order. The Defendants' remedies are limited, as is legally proper, to procedural protections and their rights, as the law dictates, find voice and representation in the NEPA process and APA review.

B. *Defendants' Remaining Arguments Supporting Summary Judgment are Not Ripe and are Barred by the Abstention Doctrine which Prohibits the Court from Issuing Advisory Opinions*

Defendants alternatively seek summary judgment on the issue of State and local land regulation, arguing that the land is neither held in trust for the tribe nor that it is "Indian Country," either of which designation might prohibit State regulation of the land. While the issue of

title, as discussed above, is settled by the QTA, the issue of the State's right to regulate cannot be answered at the present time because the Department of the Interior and the BIA have not made a decision regarding whether the land will be held in trust. Thus, at present, it is impossible for the court to determine with certainty whether the land is held (or will be held) in trust or whether it is "Indian Country" under the legal definition of that term.

The United States Constitution limits this court's jurisdiction to those involving actual "cases" and "controversies." U.S. Const. Art. III, § 2, cl. 1. The Constitution's case and controversy requirement prevents this court from issuing "advisory opinions" and from considering cases issues which are not ripe. *See Public Service Company of Colorado v. United States Environmental Protection Agency*, 225 F.3d 1144, 1148 n.4 (10th Cir. 2000) (discussing prohibition against advisory opinions); *United States v. Chavez-Palacios*, 30 F.3d 1290, 1292-93 (10th Cir. 1994) (same); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) (discussing ripeness requirement); *Initiative and Referendum Institute v. Walker*, 161 F. Supp. 2d 1307, 1310-11 (D. Utah 2001) (same).

For the court to make the factual determination on the actual status of the land for regulatory purposes-as Indian Country, as Native held non-Indian Country, or as trust land (any of which category may or may not subject the land to State and local regulation)-the court must first know what the final decisions of the BIA and the Secretary of the Interior are, and this information is unavailable to the court until the NEPA process is complete. The question of whether the Defendants may regulate the land is therefore not ripe, and the court is

unable to issue an opinion on this line of argumentation due to the Constitution's prohibition of the issuance of advisory opinions.

Order

For the reasons set forth above, Defendants motions to vacate preliminary injunction order and for summary judgment are DENIED.

APPENDIX B

Act of June 18, 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 641 *et seq.*) provides in pertinent part:

§ 461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

§ 463. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

* * * * *

§ 464. [As amended by Pub. L. No. 109-221, § 501(b)(1), 120 Stat. 343-344.] Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: *Provided further*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108-374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further*, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * * * *

§ 469. Indian corporations; appropriation for organizing

There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

§ 470. Revolving fund; appropriation for loans

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

§ 471. Vocational and trade schools; appropriation for tuition

There is authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

§ 472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or

services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

* * * * *

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

* * * * *

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for

the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

* * * * *

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

§ 478. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

§ 479. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

(2)

No. 05-1160

SUPREME COURT, U.S.
FILED
JUN 2 2 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

STATE OF UTAH; UTAH DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah municipal Corporation,

Petitioners,

vs.

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & CO. dba KUNZ OUTDOOR ADVERTISING, a California Corporation; GALE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL McCALEB, in his capacity as Assistant Secretary of Interior, Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director, Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 2

CONCLUSION 10

APPENDIX:

Notice to State of Utah of 5/17/06 BIA Decision to Approve Paiute Tribe Trust Application ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Block v. North Dakota, 461 U.S. 273 (1983) 9

Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) 1, 7

Confederated Tribe of Siletz Indians v. United States, 110 F.3d 688 (9th Cir. 1977) 1, 2

Florida v. United States Dep't of the Interior, 768 F.2d 1248 (1985), *cert. denied*, 475 U.S. 1011 (1986) 10

In re White, 139 F.3d 1268 (9th Cir. 1998) 8

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751 (1998) 7

Mistretta v. United States, 488 U.S. 361 (1989) 2

Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505 (1991) 8

Rupp v. Omaha Indian Tribe, 45 F.3d 1241 (8th Cir. 1995) 8

South Dakota v. United States Dep't of the Interior, 423 F.3d 790 (8th Cir. 2005) 1, 6, 7

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) 8

United States v. Roberts, 185 F.3d 1125, (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000) 8

United States v. Tsosie, 96 F.3d 1037 (10th Cir. 1996) 8

United States Dep't of the Interior v. South Dakota, 519 U.S. 919 (1996) 6, 7

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 3

Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 2, 3, 4, 7

FEDERAL STATUTES

25 U.S.C. § 465 ..... *passim*

28 U.S.C. § 2409a(a) 2, 8

FEDERAL RULES

25 C.F.R. § 1.2 5

25 C.F.R. § 151.10 5

25 C.F.R. § 151.11 ..... 4, 5

25 C.F.R. § 151.12 ..... 5, 6

OTHER MATERIALS

60 Fed. Reg. 32874 (June 23, 1995) 5

REPLY TO BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Petitioners seek this Court's resolution of whether Congress has unconstitutionally delegated its duty to legislate by giving the Secretary of the Interior unilateral discretion to take any land into trust "for Indians," while providing no "intelligible principle" or standards to cabin the exercise of that discretion. The case for review is premised on the Tenth Circuit's disregard of this Court's nondelegation doctrine precedents; its approval of the Shivwits Band's marketing of its exemption from state regulation to a non-Indian billboard company; its erroneous resort to selective legislative history to save a statute that provides no boundaries to guide the executive branch's exercise of the sweeping power granted; and the severe infringements on state sovereignty, jurisdiction, and regulation that trust land acquisitions inflict nationwide.[1]

Respondents offer no substantial reason for the Court to avoid assessing the constitutionality of this grant of carte blanche authority to the Secretary of Interior in section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Instead, respondents first defend the Tenth Circuit's erroneous decision by noting that other circuits have reached the same conclusion,[2] one they claim is consistent

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[1] The nationwide impact and importance of § 465 are underscored by the filing of a brief *amicus curiae* by 17 states supporting Utah's petition, as well as by South Dakota's recent filing of a petition for a writ of certiorari in *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790 (8th Cir. 2005) ("*South Dakota II*"), pending as U.S. No. 05-1428, which presents the same issue as Utah presents here.

[2] *South Dakota II*, 423 F.3d at 796; *Carcieri v. Norton*, 423 F.3d 45, 57 (1st Cir. 2005), *petition for reh'g en banc pending*. The federal respondents erroneously cite *Confederated Tribes of Siletz Indians v.*

(Continued on following page)

with *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001). Band's Br. in Opp. at 11-12, 18-19, 21; Fed. Br. in Opp. at 14-15.

They also argue that this is an isolated case because regulations adopted in 1995 and 1996 require the Secretary to weigh local concerns more heavily during the pre-acquisition process and provide for judicial review of a decision to take land into trust "for Indians." Band's Br. in Opp. at 6-7, 15-16; Fed. Br. in Opp. at 5 n.2, 18, 22-23. The respondent Band claims that, even if the statute **is** unconstitutional, this Court is barred by the Quiet Title Act, 28 U.S.C. § 2409a(a) ("QTA"), from providing petitioners any meaningful relief. Band's Br. in Opp. at 8, 15, 17-18. Alternatively, the federal respondents suggest that the QTA erects a jurisdictional bar to this Court's consideration of petitioners' challenge to the constitutionality of § 465. Fed. Br. in Opp. at 20-21. These responses merely confirm the errors in, and the pressing need for review of, the decision below.

ARGUMENT

1. As this Court has held, a statutory delegation of power to the executive branch is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (internal quotation omitted). The Band

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United States, 110 F.3d 688 (9th Cir. 1997), as likewise rejecting a claim that § 465 violates the nondelegation doctrine. Fed. Br. in Opp. at 12. The court's description of § 465 as a "valid delegation" is dictum, as the constitutionality of a section of the Indian Gaming Regulation Act, not of § 465, was at issue. *Siletz*, 110 F.3d at 691, 696, 698.

recognizes the importance of, and the severe impingements on, state sovereignty that flow from the Secretary's exercise of the broad power delegated by § 465. *See* Band's Br. in Opp. at 5. But, like the Tenth Circuit, the Band and the federal respondents ignore this Court's holding in *Whitman* that, under the nondelegation doctrine, "the degree of agency discretion that is acceptable varies according to the scope of power constitutionally conferred." 531 U.S. at 475.

In *Whitman*, this Court concluded that the delegated power to promulgate air quality standards affecting the entire nation required "substantial guidance" from Congress. *Id.* Here, the Secretary has been granted unilateral authority to take land – in any amount, in any place, for any purpose – into trust "for Indians," thereby withdrawing the land from state jurisdiction, taxation, and regulation. *See* Pet. 17-22. Yet the respondents and the Tenth Circuit (as well as the First and Eighth Circuits) have refused to follow *Whitman* and analyze the constitutional acceptability of the unbounded discretion given the executive branch by § 465 in light of the far-reaching power bestowed. This mandated analysis would have led ineluctably to a conclusion that § 465 violates Article I, section 1 of the Constitution. *See* Pet. 8-14.

2. Respondents do not defend or even address the Tenth Circuit's disregard of precedent by allowing the Shivwits Band to market their exemption from state taxation, jurisdiction, and regulation to non-Indians. This practice was disapproved by this Court in the taxation context in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980). *See* Pet. 19.

Contrary to the impression created by the federal respondents, § 465 acquisitions do not just involve regaining lost allotments or reasserting tribal sovereignty over

Indian territory taken away in decades past. Petitioners challenge a statute that is incomparably broad in its delegation of Congress's legislative power and starkly free from meaningful constraints on its exercise. As this case demonstrates, § 465 allows the Secretary to acquire land that is within a city's limits, far from a tribe's reservation and along an interstate freeway, and then to permit a non-Indian lessee to use the land for its own pecuniary benefit, free from local taxes and reasonable regulations. Denial of certiorari under these troubling circumstances will give the green light to non-Indian businesses across the country to pursue and enjoy – with the Secretary's help – the clear advantages of federal trust protection that are supposedly intended for Indians.

3. The respondent Band concedes that the Secretary's regulations cannot save § 465 from constitutional challenge under the nondelegation doctrine. Band's Br. in Opp. at 16 (citing *Whitman*, 531 U.S. at 472-73); *see also* Fed. Br. in Opp. at 5 n.2. The Band nonetheless argues that this is an isolated case because, under a new regulation, 25 C.F.R. § 151.11(b), the Secretary must give "greater weight" to local governments' concerns expressed during the comment period about "potential impacts on regulatory jurisdiction, real property taxes and special assessments," 25 C.F.R. § 151.11(d) (Band's App. C). As petitioners have already demonstrated, however, this new regulation sets no meaningful limit on the Secretary, even if it had come from Congress and not from the Secretary. Pet. 20-21.

Citing the argument of counsel in a three-year-old memorandum, unsupported by any record evidence, the Band mistakenly represents to the Court that, because of the new regulation, no other applications by the Paiute Tribe or the Shivwits Band have been approved since 1995. Band's Br. in Opp. at 16 & n.12. In fact, one such

application, filed in March 2004, was approved just last month. App. 3. Two other trust land applications by the Cedar City Band of Paiute Indians, involving more land in southern Utah that the Tribe plans to use for billboards, have been "pending" since at least 1999,[3] presumably awaiting final resolution of the instant litigation. In short, there is no evidence that the new regulation has thwarted this tribe's – or any others' – applications for trust land acquisitions or has changed the Secretary's pattern of approving off-reservation trust acquisitions despite grave local concerns.

Respondents also try to minimize the importance of the question presented here by asserting that, under a 1996 regulation adopted by the Secretary, there will be judicial scrutiny of proposed trust acquisitions before land is taken into trust by the United States. Band's Br. in Opp. at 7; Fed. Br. in Opp. at 22; *see* 25 C.F.R. § 151.12 (Band's App. D). This is not necessarily so, since regulations can always be changed or waived by the Secretary. *See* 25 C.F.R. § 1.2. They can also be ignored. In this case, the Regional BIA Director admitted that the evaluation of the Band's trust application did not consider the criterion in 25 C.F.R. § 151.10(f) (jurisdictional problems and potential land use conflicts). Pet. App. 101.

The spirit of the agency's regulations can also be ignored, even if their letter is followed. For example, 25 C.F.R. § 151.11(d), the regulation requiring notice to state and local governments upon receipt of trust applications, took effect July 24, 1995. 60 Fed. Reg. 32874, 32879 (June 23, 1995). No notice was given to Utah of either the then-pending August 1994 application by the Band or of the

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[3] Petitioners' counsel of record's telephone conversation with Jeff Zander, Trust Resource Director, Paiute Indian Tribe (June 2, 2006).

Secretary's August 1995 decision to approve the Band's application and take title. *See* Pet. App. 19. The Secretary's position at that time was that the decision to take land into trust under § 465 was not judicially reviewable. *See United States Dep't of the Interior v. South Dakota*, 519 U.S. 919, 921-22 (1996) (Scalia, J., dissenting). It was not until April 1996 that the Secretary did an about-face and hastily adopted another regulation, 25 C.F.R. § 151.12, delaying the actual taking of title for 30 days after the decision to approve a trust application. *See South Dakota*, 519 U.S. at 921-22. Thus, like South Dakota, Utah had no opportunity to object to, or obtain judicial review of, the Secretary's actions prior to the taking of title by the United States.

Even today, nothing in the agency's regulations prevents the Secretary from taking title to land under § 465 immediately at the expiration of the 30-day comment period required by 25 C.F.R. § 151.12, even if judicial review has been initiated by objectors. And once title is taken, the Secretary has consistently maintained, and the Tenth Circuit has held here, that the QTA bars a claim – whether asserted under the APA or another statute – seeking to divest the United States of title to Indian trust land. Pet. App. 16-19; *see* Fed. Br. in Opp. at 5 n.2.

This point was not lost on Justice Scalia in his dissent from the decision in *South Dakota*, 519 U.S. at 921, to grant the United States' petition for a writ of certiorari, vacate the decision below holding § 465 unconstitutional, and remand to the Secretary for reconsideration of the trust acquisition. He noted the Secretary's published preamble to then-new 25 C.F.R. § 151.12 asserted that it "permits judicial review before transfer of title to the United States" and that the government had conceded only that APA review is available before the Secretary's taking of title under the IRA. As Justice Scalia aptly concluded, "It is

inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view. . . . " *Id.* at 922.

In any event, the Court has more recently made clear that any regulations adopted by the Secretary, including those intended to counter constitutional challenges to § 465 – such as the instant case, the *South Dakota* cases, and *Carcieri* – do not inform proper analysis of whether Congress has violated the nondelegation doctrine. *See Whitman*, 531 U.S. at 472-73.

4. The respondent Band contends certiorari should be denied because the Court lacks power to grant petitioners any "meaningful relief" even if § 465 is unconstitutional: (a) title to the lands has already been taken by the United States;[4] and (b) the QTA retains governmental immunity from suits seeking to divest the United States of title to Indian trust lands. Band's Br. in Opp. at 17-18. The federal respondents assert that the Tenth Circuit's conclusion that the QTA bars the petitioners' third-party complaint against them also prevents the Court from reaching the constitutional issue here. Fed. Br. in Opp. at 21. There are several interrelated responses to these contentions.

First, respondents ignore the fact that petitioners were defendants in the district court action. As sovereigns or quasi-sovereigns, Indian tribes have enjoyed immunity from "judicial attack," but only absent consent to be sued. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998). Here, Kunz and the Band sued petitioners, seeking a declaration that the subject lands are lawfully held in trust by the United States pursuant to

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[4] This factual twist is not present in *South Dakota II* since the land at issue was removed from trust status by the Secretary after remand from this Court. 423 F.3d at 793.

§ 465 and, thus, not subject to any federal, state, or local billboard regulations. Pet. App. 6. Whatever immunity Kunz and the Band had, it was waived when they made that claim the subject of their lawsuit, thereby consenting to adjudication of the validity of § 465. "[The tribe's i]nitiation of a lawsuit is an action that 'necessarily establishes consent to the court's adjudication of the merits of that particular controversy,' including the risk of being bound by an adverse determination." *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (citations omitted);[5] *e.g.*, *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (tribe waived immunity by filing quiet title action and asking court to resolve ownership of disputed land); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) (tribe consented by intervening as plaintiff to establish its treaty fishing rights).[6]

Second, the QTA waives governmental immunity by allowing the United States "to be named **as a party defendant** in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest," except "trust or restricted Indian lands. . . ." 28 U.S.C. § 2409a(a) (emphasis added). But nothing in the

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[5] Similarly, when the United States files suit, it waives immunity and consents to full adjudication of all matters raised in its complaint. *United States v. Tsosie*, 92 F.3d 1037, 1043 (10th Cir. 1996). If this were not so, criminal defendants like that in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000), could not attack the constitutionality of § 465 in order to challenge federal court jurisdiction to prosecute them for crimes committed on trust lands that are "Indian country." *See* Pet. 17-18.

[6] Unlike *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the instant case is not one in which a defendant seeks to recover money from a tribe through a counterclaim. Here, petitioners simply seek a determination of the constitutionality of the statute about which Kunz and the Band sought declaratory relief.

QTA prevented petitioners from asserting the unconstitutionality of § 465 as a defense against plaintiffs Kunz and the Band (or against the United States, if it had joined them as a plaintiff). As this Court has recognized, this is precisely what persons asserting title to land claimed by the United States had to do before the QTA waived governmental immunity from suits over title disputes to non-trust lands, i.e., wait to be sued by the United States and then assert their adverse title claim. *See Block v. North Dakota*, 461 U.S. 273, 280 (1983).

Third, the QTA does not prevent this Court from granting relief to respondents if it declares that § 465 violates the nondelegation doctrine. If the Court were to reverse the lower courts and hold § 465 unconstitutional, this would afford petitioners declaratory relief, as they originally requested. Moreover, the Court's disposition would necessarily vacate the declaratory judgment and injunctive relief granted to Kunz and the Band by the district court against the petitioners, which was premised on the validity of § 465. This would itself constitute another form of relief requested by petitioners. *See* Pet. App. 6; First Amended Answer, Claim, and Third-Party Claim at 18, 28, 30. Both forms of relief are "meaningful" and neither contravenes the QTA.

Finally, the Court should reject the federal respondents' contention that the QTA deprives it of the power to even address whether § 465 violates Article I, section 1. Respondents ignore the important distinction between this constitutional claim and petitioners' other, nonconstitutional claim that the Secretary violated applicable statutes and regulations in taking the subject land into trust. A few circuits have held the latter category barred by the QTA's retention of immunity if successful review under the APA would divest the United States of title to Indian trust

lands. *See* Fed. Br. in Opp. at 21. But even the federal respondents cite a case that recognizes sovereign immunity does not apply to federal officials alleged to have acted unconstitutionally. *Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1251-52 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Indeed, the Tenth Circuit tacitly honored this distinction here by first addressing the constitutional claim and then determining that the non-constitutional claims are barred by sovereign immunity that the QTA retains. *See* Pet. App. 9, 18, 33.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK L. SHURTLEFF
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June 2006

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APPENDIX

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGION
P.O. Box 10
Phoenix, Arizona 85001

May 19, 2006 [receipt date stamped]

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED

Mr. Mark Shurtleff
State of Utah, Office of the Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Dear Mr. Shurtleff:

This is in reference to a proposed trust acquisition of a 6.8-acre tract on behalf of the Paiute Indian Tribe of Utah (Tribe). The Tribe has stated that the intended use of the property is for the construction of a tribal healthcare facility to serve tribal members. Subject parcel is located in Cedar City, Iron County, Utah, and is further described as follows:

PARCEL 1:

Beginning at a point south 00°09'22" west along the 1/16 Section line 481.30 feet and south 89°08'06" west 313.77 feet from the center east 1/16 corner of Section 11, Township 36 South, Range 11 West, Salt Lake Base and Meridian and running thence south 89°08'06" west 562.56 feet; thence south 01°53'26" east 104.56 feet; thence 98.65 feet along the arc of a curve to the left through a central angle of 08°24'05" and a radius of 672.80 feet; thence north 89°07'36" east 551.88 feet; thence north 00°54'48" west 202.62 feet to the point of beginning and subject to a 20

foot wide utility and drainage easement along the north boundary and subject to a 20 foot wide utility easement centered on the existing sewer line.

PARCEL 2:

Beginning at a point south 00°09'22" west along the 1/16 section line 481.30 feet from the center east 1/16 corner of Section 11, Township 36 South, Range 11 West, Salt Lake Base and Meridian and running then south 89°08'06" west 313.77 feet; thence south 00°54'48" east 593.49 feet; thence north 89°41'26" east 302.65 feet; thence north 00°09'22" east 596.52 feet to the point of beginning and together with a 20 foot wide utility and drainage easement along the north boundary of the recreation parcel described heretofore.

Subsurface rights to subject parcel are subject to prior reservations.

The Bureau of Indian Affairs (BIA) must review all acquisition proposals prior to making a decision as to whether land can be placed into trust status for a tribe. In making such a determination, we must follow the BIA's trust land acquisition regulations in Title 25, Code of Federal Regulations (CFR), Part 151, as amended (see particular rule changes published in the Federal Register on Friday, June 23, 1995, Vol. 60, No. 121, and Wednesday, April 24, 1996, Vol. 61, No. 80). The major procedures we must comply with are listed in Sections 151.9-151.14.

After our review and evaluation of the Tribe's request on this case, we have concluded that the proposed acquisition of the 6.8-acre tract would be in the best interest of the Tribe. The addition of subject property to the Tribe's reservation land base for the purpose of constructing a

tribal healthcare facility to serve tribal members will further tribal self-determination and enhance the well-being of the Tribe. This acquisition will thus satisfy 25 CFR 151.3(a). We have determined that the acquisition would be consistent with applicable guidelines and serve the best interest of the Tribe. Therefore, by our memorandum dated May 17, 2006 (copy enclosed), this office preliminarily approved the trust acquisition of the 6.8-acre tract. Enclosed is a copy of a letter dated May 17, 2006, to the Chairwoman of the Paiute Indian Tribe of Utah, reflecting our ***intent*** to take the subject tract into trust.

As prescribed under the land acquisition regulations and implementation instructions, we are required to include notice of administrative appeal rights under 25 CFR Part 2, in case you wish to appeal this decision. However, because the decision to approve the proposed acquisition is being made at the Bureau's Regional Office level, it may be appealed directly to the Interior Board of Indian Appeals (IBIA) in accordance with the regulations in 43 CFR 4.310-4.340. The IBIA is located at the following address:

U.S. Department of Interior
Interior Board of Indian Appeals
Office of Hearing and Appeals
801 N. Quincy St., Suite 300
Arlington, Virginia 22203

Your notice of appeal to the IBIA must be signed by you or your attorney and ***must be mailed within 30 days of the date you receive this decision***. It should clearly identify the decision being appealed. You must send copies of your notice to appeal to (1) the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, 4140 MIB, 1849 C Street, N.W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your notice of

appeal sent to the IBIA must certify that you have sent copies to all necessary parties. If you file a notice of appeal, the IBIA will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing notice of appeal.

We have enclosed a copy of 43 CFR 4.331-4.340. If you have any questions regarding this matter, please contact our Branch of Real Estate Services (602) 379-6781.

Sincerely,

Catherine Wilson [signature]
Acting Regional Director

Enclosures

No. 05-1160

Supreme Court, U.S.
FILED
JUN 12 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF UTAH; UTAH DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah Municipal Corporation,

Petitioners,

v.

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & CO. dba KUNZ OUTDOOR ADVERTISING, a California Corporation; GALE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL McCALEB, in his capacity as Assistant Secretary of Interior, Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director, Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF CONNECTICUT, RHODE ISLAND, ALABAMA, ARKANSAS, COLORADO, IDAHO, IOWA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NEW YORK, NORTH DAKOTA, OHIO, SOUTH DAKOTA AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR GRANTING THE WRIT	4
I. THE TENTH CIRCUIT'S DECISION EFFECTIVELY IGNORES CRITICAL ASPECTS OF THIS COURT'S DECISION IN *WHITMAN*	4
II. THE TENTH CIRCUIT'S DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT IMPACTS FUNDAMENTAL STATE SOVEREIGN INTERESTS	8
III. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE CONSTITUTIONAL PRINCIPLES UNDERLYING THE NONDELEGATION DOCTRINE	12
A. The Trust Power Has Nationwide Impact and § 465 Fails to Provide Substantial Guidance	12
B. The Trust Power's Significance is Too Great for it to Be Considered Anything Other than Legislative	16
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) 4

Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Authority, 464 U.S. 89 (1983) 15

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 10

Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) 6

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 9

Elder v. Holloway, 510 U.S. 510 (1994) 13

Exxon Mobil Corp. v. Allapattah Servs., ___ U.S. ___, 125 S. Ct. 2611 (2005) 12, 14

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 4

Printz v. United States, 521 U.S. 898 (1997) 8

Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005) ..... *passim*

South Dakota v. Department of the Interior, 423 F.3d 790 (8th Cir. 2005) 6, 11, 15

South Dakota v. Department of the Interior, 69 F.3d 878 (8th Cir. 1995), *cert. granted and decision vacated at*, 519 U.S. 919 (1996) 6, 8

United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999) 5, 6, 13

United States v. Stands, 105 F.3d 1565 (8th Cir. 1997) 10

Washington v. Conf. Tribes of the Colville Indian Res., 447 U.S. 134 (1980) 10

TABLE OF AUTHORITIES – Continued

Page

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 10

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001) ..... *passim*

STATUTES

18 U.S.C. § 1151 10

25 U.S.C. § 465 ..... *passim*

OTHER AUTHORITIES

Gary Lawson, *Article: Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) 17

Judith V. Royster and Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581 (1989) 9

REGULATIONS

25 C.F.R. § 1.2 16

25 C.F.R. § 1.4(a) 9

25 C.F.R. § 151.11 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl.17 9

U.S. Const. art. IV, § 3 9

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* States of Alabama, Arkansas, Colorado, Connecticut, Idaho, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New York, North Dakota, Ohio, Rhode Island, South Dakota and Wyoming (the "*Amici* States"), by and through their Attorneys General, respectfully submit this brief in support of the Petition for a Writ of Certiorari filed by the State of Utah.

The *Amici* States have a vital interest in this case because it concerns the constitutionality of 25 U.S.C. § 465 ("§ 465"), which grants the Secretary of the Interior ("the Secretary") unfettered discretion to take land within any State into trust on behalf of Indian tribes. Land taken into trust is immediately removed from state authority in many respects, limiting the impacted State's ability to exercise its fundamental police powers to protect the welfare of the public both on the trust land and in the surrounding communities. Specifically, the Secretary has taken the position that trust land is exempt from land use restrictions and possibly environmental regulations. Moreover, trust land is immediately removed from the taxing authority of state and local governments, thereby depriving them of substantial revenue. Thus, the end result of taking land into trust is the removal of land from the State's jurisdiction in many respects – without the State's consent – and the creation of an area controlled by a competing sovereign within that State's borders.

The Secretary has already taken into trust several million acres nationwide pursuant to § 465 (an area approximately twice the size of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land into trust. Despite

the expansive scope of those acquisitions and their substantial impacts on the States and their sovereign interests, this Court has not yet determined whether or not § 465's delegation of the trust power to the Secretary comports with the nondelegation doctrine and is therefore constitutional. Even more troubling, lower courts that have considered the issue – including the Tenth Circuit here – have failed, contrary to this Court's precedent, to even consider the trust power's negative impacts on state sovereignty and, instead, have reflexively upheld § 465 based on cases that did not implicate such interests. The States have a compelling interest in having the trust power's impacts on their sovereignty properly considered and the constitutionality of § 465 determined by this Court.

SUMMARY OF THE ARGUMENT

This case presents the question whether the nondelegation doctrine – which this Court has previously characterized as rooted in the principles underlying our entire system of government – still has any meaning. Consistent with this Court's pronouncements, the *Amici* States believe it does and that it mandates reversal of the Tenth Circuit's decision.

In this Court's most recent decision addressing the nondelegation doctrine, *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), this Court reaffirmed the nondelegation doctrine's continued viability. Although the Court upheld the statute at issue in that case, it reiterated that delegations of legislative power are unconstitutional and made explicit that whether a grant of authority by

Congress is an unconst[illegible]onal delegation depends on two things: the "degree of agency discretion" Congress allows and "the scope of the power congressionally conferred." *Id.* at 475. Thus, Congress must provide "substantial guidance" when it grants an agency power that has a national scope and impact and need only provide limited guidance when giving an agency power to control more prosaic matters. *Id.*

As self-evident and solidly grounded in constitutional fundamentals as this Court's guidance was, the Tenth Circuit deliberately refused to follow it. Instead, that court explicitly ignored *Whitman*, going so far as to indicate that *Whitman* did nothing substantial to inform the lower courts' nondelegation analysis and conclude that it was bound by a pre-*Whitman* panel decision. Pet. App. 13. In neither that prior panel decision nor the decision below did the Tenth Circuit analyze the discretion Congress afforded the agency in light of the expansive scope and impact of the trust power on the States' sovereign interests, as *Whitman* requires. The Tenth Circuit not only treated the nondelegation doctrine as dead, it treated *Whitman* as a ghost. As a result, it failed to consider the trust power's national scope and profoundly negative impacts on state sovereign interests in assessing the constitutionality of § 465.

When the trust power's national scope and its direct and substantial encroachment on core state interests are considered, it is evident that § 465 does not provide sufficient guidance. The statute allows the Secretary to take land anywhere nationwide into trust, removing it from state and local tax rolls and, by regulation, exempting it from land use restrictions. The end result is the creation of

a "jurisdictional island" within the borders of a sovereign state.

It can be questioned whether Congress can delegate such expansive and constitutionally significant power at all. *Whitman*, 531 U.S. at 487 (Thomas, J., concurring). If it can, this Court has made clear that it must, at the very least, provide "substantial guidance" to direct the agency's exercise of that power. *Id.* at 475. Section 465 provides no real guidance and is, therefore, unconstitutional.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION EFFECTIVELY IGNORES CRITICAL ASPECTS OF THIS COURT'S DECISION IN *WHITMAN*

Although this Court has not held a statute unconstitutional on nondelegation grounds since 1935 – when it struck down two statutes enacted by the same Congress that enacted § 465 – it made clear in *Whitman* that the nondelegation doctrine was not a dead letter. *Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 474 (2001) (discussing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). This Court reiterated the fundamental principles that the Constitution vests all legislative power in Congress, that the constitutional "text permits no delegation of those powers" and that "when Congress confers decisionmaking authority upon agencies [it] must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (quotation marks omitted).

In addition to recently reaffirming its commitment to the constitutional principles underlying the nondelegation doctrine, this Court provided valuable guidance as to how lower courts should apply them, instructing that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* at 475. For example, "[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy." *Id.* Thus, *Whitman* establishes that the nondelegation doctrine remains viable and that the "scope of the power congressionally conferred" is a critical part of the inquiry – where Congress confers a power that has a broad scope, the statute must provide "substantial guidance" to the agency. *Id.*

Remarkably, the Tenth Circuit chose to completely ignore that guidance. Indeed, it not only failed to consider the exceedingly expansive scope of the § 465 trust power and its incursions on state sovereignty in rejecting the nondelegation challenge, it went so far as to expressly conclude that *Whitman* did not significantly inform the nondelegation analysis. Pet. App. 13 (concluding that court remained bound by a pre-*Whitman* panel decision upholding § 465 against a nondelegation challenge); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) (prior panel decision). As a result, the scope of the trust power was never considered as part of the nondelegation inquiry below – the Tenth Circuit simply focused on the putative "limitations" imposed by the statute and required Congress to provide only minimal guidance. In so doing, the Tenth Circuit treated the trust power – which gives the Secretary the ability to create islands "for Indians" within

a State, adversely affecting state jurisdiction and regulatory authority[1] – as no different from the regulation of "country elevators." *Whitman*, 531 U.S. at 475. That is nonsense.

Unfortunately for the States and citizens impacted by the unfettered exercise of the trust power by the Secretary, the Tenth Circuit is not alone in its complete disregard of the scope of the trust authority in assessing the constitutionality of § 465's standardless discretion. Indeed, every circuit court to address § 465's constitutionality post-*Whitman* has disregarded the fundamental impacts of the trust power on state sovereignty. *See South Dakota v. Department of Interior*, 423 F.3d 790, 796 (8th Cir. 2005) (Petition for Writ of Certiorari Pending No. 05-1428) (*see infra* footnote 7); *Carcieri v. Norton*, 423 F.3d 45, 49 (1st Cir. 2005) (petition for rehearing *en banc* pending)[2]; *see also* Pet. App. 14 (noting that although the First Circuit cited *Whitman* in *Carcieri*, it "made no mention of it having altered or 'modernized' the non-delegation principles that were in place when *Roberts* was decided").

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[1] Of course, the affected State will make every effort to limit the impact of the trust acquisition on its sovereign interests through legal challenges. Even if the State is ultimately successful to some degree, the acquisition results in uncertainty and litigation.

[2] Neither the Eighth Circuit in *South Dakota*, 423 F.3d at 795-800, the First Circuit in *Carcieri*, 423 F.3d at 56-59, nor the Tenth Circuit below addressed the issue of whether the "degree of agency discretion" was "acceptable" in relation to the "scope of the power congressionally conferred" under a nondelegation analysis as required by *Whitman*, 531 U.S. at 475. Instead, as with the Tenth Circuit below, they relied upon the reasoning in *Roberts* that in turn relied upon the dissent in the initial panel decision in *South Dakota v. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995) (Murphy, J., dissenting), *cert. granted and decision vacated at*, 519 U.S. 919 (1996), to uphold the delegation.

The existing situation is untenable. *Whitman*'s recognition that Congress must provide more guidance when conferring a power that has nationwide impact – like the trust power – than it must provide when legislating in more quotidian areas is simply too fundamental to be ignored. *Whitman*, 531 U.S. at 475.

Despite that principle's importance, the lower courts have blithely failed to consider the scope of the trust power at all in assessing the constitutionality of § 465. That failure is of particular import here given the trust power's substantial and negative implications for state sovereignty. The federal courts appear to have been blinded to the continued existence of the nondelegation doctrine by the lapse of time since this Court last invoked it to hold a statute unconstitutional and by the lower courts' pre-*Whitman* decisions upholding § 465. It is up to this Court to provide a definitive statement as to the viability of the nondelegation doctrine.

This case presents a crucial opportunity to provide such a statement. It may be that a statute only runs afoul of the nondelegation doctrine if Congress delegates a power of extraordinary scope and fails to provide "substantial guidance." *Whitman*, 531 U.S. at 475 (opinion of the Court). It may be that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring). Either way, § 465 is patently unconstitutional. Ultimately, this Court should provide a clear answer, whatever it may be.

II. THE TENTH CIRCUIT'S DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT IMPACTS FUNDAMENTAL STATE SOVEREIGN INTERESTS

Whether § 465 is an unconstitutional delegation of legislative power is more than just a technical question; the exercise of the trust power strikes at the core of state sovereignty and fundamentally impacts the balance of power between the States, the federal government and the Indian tribes. It allows the Secretary to take land anywhere in the Country – no matter how far removed from the tribe's reservation – into trust, thereby carving it out of the State's territorial jurisdiction in many respects and severely limiting the State's ability to protect the health, safety, and welfare of all citizens within the State, Indian and non-Indian alike.[3] Allowing the Secretary to exercise power of that scope without even minimal – let alone substantial – Congressional guidance is a clear violation of the nondelegation doctrine.

The Constitution recognizes the States' core sovereign interests, particularly where their control over their territory is concerned. *See, e.g., Printz v. United States*,

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[3] As the Eighth Circuit noted in striking down § 465 as an unconstitutional delegation,

> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present.

South Dakota v. Department of the Interior, 69 F.3d 878, 882 (8th Cir. 1995), *cert. granted and decision vacated at*, 519 U.S. 919 (1996).

521 U.S. 898, 918-19 (1997) (noting that the States' "residuary and inviolable sovereignty" is "reflected throughout the Constitution's text, including . . . the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3"). The exercise of the trust power directly and profoundly infringes on those constitutionally protected interests.[4]

As averred to above, when the Secretary exercises the trust power, the land taken into trust is in many respects removed from the State's territorial jurisdiction and state and local governments' ability to regulate that land is adversely affected. Specifically, trust land is insulated from state and local taxation, land use restrictions and, possibly, environmental regulation. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-11 (1998) (noting that trust land is insulated from state and local taxation absent clear congressional authorization); 25 C.F.R. § 1.4(a) (providing that trust land is exempt from "the laws . . . or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property"); Judith V. Royster and Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581 (1989) (concluding that environmental regulation "whether aimed at native or non-native persons or activities, is prohibited in Indian country"). Moreover, there is a

[4] The strength of that interest is further reflected by the Enclave Clause, U.S. Const. art. I, § 8, cl.17, which requires the federal government to obtain the consent of a State before exercising exclusive legislative authority over land within the State.

question as to whether – as the Tenth Circuit held below – trust lands are "Indian country."[5] If they are, that imposes even more barriers to state civil and criminal jurisdiction on trust lands, because in Indian country state regulatory interests are generally made subordinate to the federal interest in favor of tribal sovereignty. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980).

The ultimate result of the Secretary's exercise of the trust power on behalf of an Indian tribe goes beyond the substantial impacts resulting from limiting the State's regulatory control and ability to tax the land. Taking land into trust also creates an area controlled by a competing sovereign within the State's borders without the State's consent, either directly or through congressional guidance and direction. Few, if any, other powers have such direct, fundamental and negative impacts on state sovereignty. This case demonstrates those negative impacts. The tribe marketed its exemption from state regulation to a private entity to allow that entity to engage in conduct that violated state law.[6] Thus, the trust power was used as a deliberate end-run around state law.

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[5] Circuit courts are split on the question. *Compare Shivwits Band of Paiute Indians v. Utah* (Pet. App. 45) (assuming that trust land constitutes "Indian country" as defined in 18 U.S.C. § 1151) with *United States v. Stands*, 105 F.3d 1565, 1572 & n.3 (8th Cir. 1997) ("For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country. In some circumstances, off-reservation tribal trust land may be considered Indian country.").

[6] *Colville* informs us that tribes cannot market an exemption from state law such as this, where the value marketed by the tribe is not generated on the reservation. *Washington v. Conf. Tribes of the Colville*

(Continued on following page)

This is far from the only such example of the nationwide impact of the Secretary's exercise of the trust power. The Secretary has already taken into trust several million acres nationwide pursuant to § 465 (an area approximately twice the size of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land into trust. Each of those potential trust acquisitions has substantial reverberations. One example is the trust acquisition of 90 acres in the City of Oacoma, South Dakota, which due to the location of the land threatens to stifle the natural growth of the community.[7] Each such trust acquisition deprives the impacted State of aspects of its regulatory authority, in favor of a competing sovereign.

In light of the scope of the § 465 trust power and its substantial impact on state sovereignty, there can be no doubt that Congress was required to provide the Secretary "substantial guidance" as to how to exercise that power. *Whitman*, 531 U.S. at 475. Contrary to the implications of the decision below, imposing sharp limits on state jurisdiction over lands within their borders in favor of a competing sovereign is not equivalent to regulating "country elevators." *Id.*

Indian Res., 447 U.S. 134 (1980). The Secretary's unbridled power gives rise to these situations of acquiring trust land solely to market an exemption, contrary to *Colville*'s teaching.

[7] South Dakota challenged that acquisition and has filed a Petition for a Writ of Certiorari with this Court, No. 05-1428, requesting review of *South Dakota v. Department of Interior*, 423 F.3d 790 (8th Cir. 2005) (rehearing and rehearing *en banc* was denied February 6, 2006, with Chief Judge Loken and Judge Gruender dissenting). Like Utah's petition here, South Dakota's petition also presents the question of whether § 465 unconstitutionally delegates legislative power.

III. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE CONSTITUTIONAL PRINCIPLES UNDERLYING THE NONDELEGATION DOCTRINE

As discussed above, the Tenth Circuit's failure to consider the scope of the trust power in assessing § 465's constitutionality was inconsistent with this Court's direction in *Whitman*. That is not the only flaw in the decision below. The Tenth Circuit also improperly relied on legislative history to find an "intelligible principle" in § 465. As this Court has recognized, legislative history is "often murky, ambiguous, and contradictory" and § 465's is particularly so. *Exxon Mobil Corp. v. Allapattah Servs.*, ___ U.S. ___, 125 S. Ct. 2611, 2626 (2005). It does not provide meaningful congressional guidance limiting the exercise of the trust power and pretending that it does simply allows the Secretary to cherry pick whatever "guidance" she would like to follow. That is unacceptable under any circumstances and particularly so here given the scope of the trust power. Indeed, the trust power has such an impact on core state sovereign interests that it should be considered inherently legislative and should not be delegated at all.

A. The Trust Power Has Nationwide Impact and § 465 Fails to Provide Substantial Guidance

Section 465 is patently unconstitutional under this Court's delegation jurisprudence. *Whitman* made clear that in the intelligible principle inquiry "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* at 475. Where a power of national scope – especially one that is

intrusive on state sovereignty – is at issue, Congress must provide the entity exercising that power "substantial guidance" to avoid an unconstitutional delegation. *Id.*

There is no doubt that the trust power is of national scope. That cases raising the same issue were also recently decided by the First and Eighth Circuits and that multiple States from throughout the Nation have signed on to this *amicus curiae* brief is a testament to that. Thus, the pivotal question is whether § 465 provides "substantial guidance" as to how the trust power must be exercised. *Id.*

By any reasonable measure, the guidance § 465 provides – essentially that the trust land be acquired "for Indians" – does not rise to the level of "minimal," let alone "substantial." At the outset, the Court should note that the Tenth Circuit did not even consider whether the guidance met the "substantial" standard *Whitman* contemplated where powers of national scope are at issue. *Id.* That alone is reason enough to grant *certiorari*, reverse the decision and remand it for proper consideration of the scope of the power pursuant to *Whitman*. *Cf. Elder v. Holloway*, 510 U.S. 510, 515 (1994) (granting certiorari, reversing and remanding where circuit court misconstrued Supreme Court precedent).

Had the Tenth Circuit properly considered whether the guidance Congress provided was sufficiently "substantial" in light of the scope of the trust power, the result would have been different. As it was, the decision in *Roberts*, which the circuit court concluded bound it despite this Court's decision in *Whitman*, had to resort to legislative history to find even limited guidance. *See United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). In so doing, the court implicitly acknowledged that the

statutory text alone is not enough to supply even the guidance necessary where less significant power is at issue. That is certainly true.

Because the statutory text provides functionally no guidance for the exercise of the trust power, the Tenth Circuit – in *Roberts* and, by extension, here – relied on § 465's legislative history to provide the constitutionally required intelligible principle. Pet. App. 12-13. That was improper.

Allowing the Secretary, through her designees, to exercise such far-reaching and constitutionally momentous power guided only, or even in part, by legislative history – as opposed to statutory text – is extremely problematic. This Court recognized as much in *Whitman*, explicitly providing that "[w]hen Congress confers its decision-making authority on agencies Congress must lay down *by legislative act* an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472 (emphasis added; quotation marks omitted). Legislative history is not a "legislative act." *See, e.g., Exxon Mobil Corp. v. Allapattah Servs.*, ___ U.S. ___, 125 S. Ct. 2611, 2626 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."). Nor does it provide meaningful guidance upon which to base the exercise of substantial power. As this Court has noted, "legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Id.* (citation omitted).

This case is an excellent example of why statutory text, rather than legislative history, must provide the guidance the Constitution requires. The legislative history at issue here is contradictory. For instance, several parts of that history indicate that § 465 was intended to apply only to landless Indians – which would not include the Shivwits Band. *See, e.g., South Dakota v. Department of the Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (noting that "the legislative history frequently mentions landless Indians" and citing examples). The Secretary has, however, chosen to apply the statute much more broadly than those portions of its legislative history would indicate. In so doing, the Secretary has picked out her "friends" and discarded the inconvenient information.

Although it can be fraught with difficulty, courts have the constitutional authority to assess sometimes ambiguous legislative history and use it to inform the interpretation of a statute. *See, e.g., id.* (concluding that although the legislative history "frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians"). That is a "quintessential judicial function." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Authority*, 464 U.S. 89, 98 (1983). Here, the Tenth Circuit – along with the other lower courts that relied on legislative history to sustain § 465 – essentially delegated that function to the Executive Branch by leaving the Secretary to fill the vacuum created by the lack of statutory guidance by making her own determination of what Congress intended by cherry picking legislative history for "guidance" that suits her purposes. Not only is that an abdication of Congress' duty to provide "substantial

guidance" where allowing other branches to exercise powers of broad scope, it is also an abdication of the judicial power.

The Secretary has taken advantage of the vacuum left by those abdications to seize unfettered power. Although she has promulgated rules that contain factors for the consideration of whether lands are located "outside of and noncontiguous to the tribe's reservation" when taking land into trust, 25 C.F.R. § 151.11, those rules do not actually limit her discretion.[8] She has retained the ability to "waive or make exceptions" to the regulations "where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indian." 25 C.F.R. § 1.2. Thus, the end result is an agency fiefdom, with the Secretary wielding extraordinary power constrained only by her discretion and without any real congressional guidance.

B. The Trust Power's Significance is Too Great for it to Be Considered Anything Other than Legislative

Even if Congress had provided a meaningful intelligible principle to guide the Secretary's exercise of the trust power, which it did not, the trust power is of such significance that it is inherently legislative and cannot constitutionally be delegated. In Justice Thomas' concurrence in *Whitman*, he expressed the view that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the

[8] Of course, even if they did, it would not avoid the nondelegation problem. *See Whitman*, 531 U.S. at 473 (noting that the promulgation of administrative rules cannot "cure an unconstitutional delegation").

decision to be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring); *see also* Gary Lawson, *Article: Delegation and Original Meaning*, 88 Va. L. Rev. 327, 331 (2002) ("Justice Thomas is clearly right about the Constitution. It does contain a discernible, textually grounded nondelegation principle that is far removed from modern doctrine.").[9] The *Amici* States' position is consistent with this view, as it is difficult to imagine a delegated decision that would be more constitutionally significant than the decision to take land into trust.

As discussed in detail above, the exercise of the trust power has profound impacts on the State within which the trust land is located. This case illustrates those impacts. Here, the tribe used the trust power to help a private party make a deliberate end-run around state law by carving the subject land out of Utah's ability to control. The decision and its consequences for state jurisdiction are of extraordinary significance, both constitutionally and practically, and simply cannot properly "be called anything other than 'legislative.'" *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

Ultimately, the decision below can only be allowed to stand if the nondelegation doctrine is truly dead. Section 465 allows the Executive to exercise broad power directly and fundamentally infringing on state sovereignty nationwide based on "guidance" the Executive is allowed to

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[9] Justice Thomas went on to note that were the issue presented he "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.* at 487. As noted above, the *Amici* States intend to present that question if given the opportunity.

distill from ambiguous legislative history. If the nondelegation doctrine allows § 465 to stand, it is meaningless. If that is indeed the case, the death of the nondelegation doctrine should at least be acknowledged by this Court – the doctrine should not be allowed to simply wither from desuetude.

CONCLUSION

For all of the foregoing reasons, the *Amici* States respectfully request that the Court grant the Petition for a Writ of Certiorari.

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